

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
 )  
vs. )  
 )  
 ) No. 1:13-cr-10238-DPW-2  
AZAMAT TAZHAYAKOV, )  
 )  
Defendant. )  
 )

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK

DAY ONE OF JURY TRIAL

John Joseph Moakley United States Courthouse  
Courtroom No. 1  
One Courthouse Way  
Boston, MA 02210  
June 30, 2014  
8:40 a.m.

Brenda K. Hancock, RMR, CRR  
Official Court Reporter  
John Joseph Moakley United States Courthouse  
One Courthouse Way  
Boston, MA 02210  
(617) 439-3214

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1                                P R O C E E D I N G S:

2                    THE CLERK: All rise.

3            (The Honorable Court entered the courtroom at 8:40 a.m.)

4                    THE CLERK: This Honorable Court is now in session.  
5            You may be seated.

6                    This is the matter of United States versus Azamat  
7            Tazhayakov, Criminal Action 13-10238.

8                    THE COURT: Well, I want to go over choreography,  
9            first. That is why I asked Mr. McAlear to be clear. As I  
10           understand it, and Mr. McAlear will correct me if I am wrong,  
11           what we are going to do is have Mr. Tazhayakov just outside the  
12           jury area. The entrance to the jury doors out there will be  
13           closed down when we are ready to see him. He will walk in, and  
14           I think I would like to have in that area as well Government  
15           counsel and his counsel. They will lead, that is, Government  
16           counsel going first, defense counsel will go in second,  
17           Mr. Tazhayakov third, and they will be set up as Mr. McAlear  
18           has them set up. Once they are in place, then I will be called  
19           to come in. I will try to do that promptly right after, that I  
20           will be in the clerk's area anyway, maybe in the jury office  
21           there. With respect to my clerks, I suppose they can simply  
22           stand at the side over in the corner.

23                    Mr. McAlear, is that?

24                    MR. McALEAR: If that's all right with the Marshals.

25                    THE MARSHALL: Yes, your Honor.

1 THE COURT: And then we will be off and running. I  
2 think that is clear. Is it clear enough for everybody here and  
3 for the Marshals as well?

4 MS. FERRONE: Yes, your Honor, it's clear.

5 MR. CAPIN: I think it's clear. We're talking simply  
6 about the choreography of what we are doing on the second  
7 floor?

8 THE COURT: Yes, this morning.

9 MR. CAPIN: This morning. And I take it counsel will  
10 be introducing ourselves.

11 THE COURT: No. I will be doing that.

12 MR. CAPIN: You will be doing that?

13 THE COURT: Yes.

14 MR. CAPIN: Thank you.

15 THE COURT: I will just simply make reference to  
16 counsel during the course of it, but you will be coming in and  
17 be seated before I get into the jury room.

18 MR. CAPIN: Understood. Thank you.

19 THE COURT: So, that is, I think, all we really need  
20 to know. The Marshals will understand that counsel will be  
21 there as well and the order of the parade.

22 You are free to go, Jim. Thank you.

23 MR. McALEAR: Thank you, your Honor.

24 THE COURT: I just wanted to be sure I did not make  
25 another mistake in this.

1 MR. McALEAR: Sounds great.

2 THE COURT: Just for scheduling today, I just received  
3 the Government's Opposition to the Motion to Exclude the  
4 exhibits. I will look at it. But what I would like to do, I  
5 think, is get us back together around 2:00, at which point I  
6 will go through the deposition and this Motion to Exclude and  
7 any other things that are kicking around. At that time I will  
8 give you an indication of my view about the Government's  
9 reference in opening statement to the statements of the  
10 defendant at that time as well, so you have some sense,  
11 sufficient sense to prepare for the trial.

12 Thereafter, we think probably 2:30, 3:00 we will get a  
13 disc of all of the questionnaires; it can be provided to  
14 counsel, and then you are going to have to start looking at  
15 those discs.

16 I think what I am going to want to do is get back here  
17 around 8:30 tomorrow morning again, before we have the next  
18 collection of jurors come in, and begin the discussion about  
19 what we do with the jurors that had filled out questionnaires  
20 on Monday. Some of them will be, I think, pretty clear, some  
21 of them will not, and I am going to encourage the parties to  
22 agree upon, as best they can, some of these people, and I may  
23 well refer to some so that you do not have to think about them  
24 at all.

25 And the process on Tuesday, I think, in the morning

1 will be just getting the names of the persons who filled out  
2 questionnaires on Monday, who will be called in for Wednesday,  
3 and the same process will go forward on Tuesday, questionnaires  
4 as well.

5 If we are lucky, we will be able to get 40-or-so  
6 jurors from the Monday group after some form of voir dire on  
7 Wednesday, and then we would do peremptories either the end of  
8 Wednesday or beginning of Thursday. If it takes a little bit  
9 longer, we will go a little bit longer with the Tuesday group.  
10 But that is the plan.

11 Now, are there other things that you have got in mind  
12 you want to talk about at this point?

13 MR. CAPIN: The Government left you a copy, your  
14 Honor, of our exhibits, so you can look at them and decide the  
15 motion that is pending.

16 THE COURT: All right. Anything else?

17 So, why don't you remain here. We will get a call  
18 from Mr. McAlear and troop down there, and we will go from  
19 there.

20 MR. CAPIN: Thank you.

21 THE COURT: I will address the jury for probably 10  
22 minutes or so.

23 We will be in recess.

24 THE CLERK: All rise.

25 (The Honorable Court exited the courtroom at 8:48 a.m.)

1 (Recess taken)

2 THE COURT ADDRESSES VENIRE IN THE JURY ASSEMBLY ROOM:

3 THE CLERK: All rise for the Honorable Court.

4 (The Honorable Court entered the Jury Assembly Room at  
5 9:05 a.m.)

6 THE CLERK: This Honorable Court is now in session.  
7 You may be seated.

8 This is Criminal Action 13-10238, the United States  
9 versus Azamat Tazhayakov.

10 THE COURT: Good morning, ladies and gentlemen.

11 I want to introduce myself and welcome you, formally,  
12 to the United States District Court for the District of  
13 Massachusetts.

14 My name is Douglas Woodlock. I am the Judge of the  
15 Court who will preside over the trial in United States versus  
16 Azamat Tazhayakov. The Court has summoned you here today as  
17 potential members of the jury in that case, and I want to thank  
18 you for your presence and your attendance today.

19 This morning what I am going to do is explain to you  
20 about the jury selection process, some important principles for  
21 you to understand, today's schedule, and a little bit more  
22 about the case.

23 However, first, let me start with some preliminary  
24 remarks about the importance of the jury system in our society.

25 The jury is central to the administration of justice



1 under our system of law in the United States. In both criminal  
2 and civil cases verdicts are rendered by a jury composed of  
3 citizens like you. The founders of our nation believed that  
4 the right to a jury was so important that they put it into the  
5 *U.S. Constitution* and the *Bill of Rights*.

6 We are a democracy, where people rule. As a  
7 consequence, we do not look to lawyers or judges to make a  
8 factual determination in legal proceedings. We look to the  
9 cross-section of the community to exercise their common sense  
10 in doing so.

11 It is the responsibility of every citizen to appear  
12 and serve as a juror, when called. Such service is both an  
13 obligation of citizenship, and it is an opportunity to serve a  
14 vital public and civic function. Juries have been composed of  
15 citizens taken from all walks of life, each of whom brings  
16 their own special individual perspective and life experience to  
17 the table. You do not need to have some particular education  
18 or experience to be a juror.

19 Your participation in the jury selection in this case  
20 or in any other case is no small thing. It is, in fact,  
21 central as a central component of our enduring democracy.

22 Acknowledging the importance of jury service is not to  
23 ignore the obvious point that your appearance here is, at the  
24 very least, inconvenient. Certainly, serving on a jury, if you  
25 are chosen to serve, will be a disruption to your daily lives.

1 You should not, however, assume that your jury service, if you  
2 are chosen to sit on this jury, will be burdensome. Jurors  
3 regularly report to my colleagues and to me that they found  
4 their service to be one of the most interesting and memorable  
5 experiences of their lives.

6 After most trials, I meet briefly with jurors and  
7 thank them for their service. I do not make, in fact it would  
8 be improper for me to make any inquiry about their  
9 deliberations or have any discussion about the deliberations.  
10 That is confidential, between you and your fellow jurors. But  
11 I do inquire about their experience as jurors and whether there  
12 is anything that the Court can do to improve service for future  
13 jurors.

14 Uniformly, during the course of those discussions, the  
15 jurors tell me that the experience was both worthwhile,  
16 interesting, and fundamentally important to them. If you are  
17 chosen to serve in this case, I expect and hope that you will  
18 find the experience to be the same.

19 So, let me start by explaining the important purpose  
20 of the jury selection process and the jury selection process  
21 that we are going to follow in this case. Both parties have a  
22 right to a jury that is fair and impartial, one that is not  
23 biased or prejudiced in any way. To obtain a fair jury, we  
24 have a selection process. This process is not meant to be  
25 intrusive. The parties and I have worked very hard to avoid

1 that. It is important to ensure that the parties have a fair  
2 and impartial jury to hear the case, and so you are going to be  
3 hearing those words over and over again: "fair and impartial."  
4 It is important that each of you understand what I mean by that  
5 phrase.

6 To serve fairly and impartially as a juror means to  
7 hear the evidence in this case and decide the outcome without  
8 bias or prejudice or predisposition. You have to consider the  
9 testimony of all the witnesses who are properly before you,  
10 consider all of the evidence that I permit to be presented to  
11 you. It means that you base your verdict only on the evidence  
12 that is presented in court and in light of the law as I will  
13 give you. That is, both parties are entitled to a jury that  
14 does not have its mind made up ahead of time one way or the  
15 other about any of the issues in the case before they hear the  
16 evidence and have been instructed by me to begin their  
17 deliberations.

18 There has been media coverage of this case, and I  
19 suspect there will be coverage during the trial. The mere fact  
20 that you have been exposed to, you have read, or heard  
21 something about this case does not mean that you cannot be a  
22 fair and impartial juror. The critical issue, the one that we  
23 are going to be probing about and asking you about, is whether  
24 if you have read or seen or heard something about this case or  
25 something that you think touches on this case, whether you can

1 put it aside and decide the case solely on the basis of the  
2 evidence that is presented in court at trial and according to  
3 the law.

4 The jury selection process that we are about here is  
5 designed to ensure the fairness and the impartiality to both  
6 sides of the case in that way.

7 I have always thought that there is an image which  
8 captures what it is to be a fair and impartial juror. It is  
9 the statute of Lady Justice that you see sometimes on the top  
10 of a courthouse, not this courthouse, but some courthouses.  
11 She is a woman who is holding a scale in one hand, she is  
12 holding a sword in the other, and she has got a blindfold on.

13 It is pretty easy to understand why she is holding the  
14 scale. She is there to weigh whatever evidence is placed  
15 before here. It is pretty easy to see why she is holding a  
16 sword. She is obligated to enforce the law as the judge tells  
17 her the law requires.

18 But why does she have a blindfold on? I am going to  
19 suggest to you that she has a blindfold on because she has an  
20 obligation to shield herself from all extraneous matters, from  
21 bias, from prejudice, from undue sympathy, from predisposition,  
22 and any other matter not properly placed in the scales  
23 themselves. That is what it means to be a fair and impartial  
24 juror. That is what it means to decide the case solely on the  
25 basis of the evidence presented in court and in light of the

1 principles of law on which I will instruct you as the case  
2 proceeds.

3 The jury selection in this case is going to proceed in  
4 three parts. The first part will begin this morning, after I  
5 conclude my remarks and you are sworn. Mr. McAlear, the  
6 Court's Jury Administrator, and our court staff will then  
7 distribute a jury questionnaire to each of you. As you  
8 complete this questionnaire, please do not discuss any of the  
9 questions or your answers with anyone else in the room,  
10 including any other potential jurors or any of the court staff.  
11 You have to do this on your own.

12 Do not fight the questionnaire. Answer the questions  
13 as best you can. They are designed to elicit information that  
14 will be helpful to us from you without you receiving some  
15 advice from somebody else. I want you to keep in mind that  
16 there are no right or wrong answers to any of the questions on  
17 the questionnaire. What is most important is that you each  
18 answer, and you answer each and every question truthfully and  
19 to the best of your abilities.

20 The questions are not designed to pry into personal  
21 matters or beliefs unnecessarily. Rather, they are designed to  
22 assist the Court and counsel in determining whether a juror  
23 should sit or not sit.

24 In this case, to ensure that we can move through the  
25 selection process as efficiently and as smoothly as possible,

1 please be sure to answer every question and answer every  
2 question completely. At the end of the questionnaire, you must  
3 sign it, confirming that you have had no assistance in  
4 completing the questionnaire, and that you have answered the  
5 questions truthfully.

6 As you will see on the questionnaire, if you believe  
7 that your response to any question is of a personal or a  
8 private nature that you would not like to have made public,  
9 there is a place at the end of the questionnaire to identify  
10 each such question and to offer your reasons why you think it  
11 is private or personal. Although there may be follow-up  
12 questions that I need to ask you about this matter, I will  
13 endeavor to do so, bearing your concerns in mind.

14 Please know that the completed questionnaires are for  
15 the review by the Court and counsel in this matter solely for  
16 the purposes of jury selection. Although there may be  
17 follow-up questions that I need to ask you individually and in  
18 public about some particular question that you answered on the  
19 questionnaire, you should understand that the questionnaires  
20 will be treated as confidential, and they will remain under  
21 seal in this court, unless and until this Court or some other  
22 Court that has responsibility for it, orders any unsealing, and  
23 even then I expect that sensitive information will remain under  
24 seal.

25 Once you have completed the questionnaire and signed

1 it and handed it to the court staff, you are free to leave for  
2 the day. But I want you to remember two important points.  
3 First, do not speak to anyone, your family members, your  
4 friends, your co-workers, anyone, about the jury selection  
5 process, the questionnaire or your answers to it.

6 Second, do not speak to anyone, again, not to your  
7 family, or your friends, or your co-workers, or anyone else, or  
8 communicate in any way about this case, the Court, the parties  
9 or anything related to the case. If your family or friends or  
10 co-workers are curious about where you spent your morning  
11 today, then you will just tell them that you were called for  
12 jury duty and may need to return for further service, and that  
13 you have been instructed by the judge not to say anything more,  
14 so do not.

15 I expect, as I said, there may be press coverage about  
16 this matter. But you must not read, listen to, be exposed to  
17 any media coverage, whether it is print, TV, Web, radio or any  
18 form, until this case is completed or until you are told that  
19 you will not be a juror in this matter, or, if you are selected  
20 as a juror, until you are discharged as a juror at the end of  
21 the case.

22 Before you leave for the day, you will be instructed  
23 to call the jury information phone tomorrow, Tuesday, after  
24 6:00 p.m. to listen to a pre-recorded message that will inform  
25 you about your future service in this matter. For some of you,

1 the phone message will indicate that you are excused from  
2 service in this case and you do not have to return to the  
3 courthouse on this case. For other jurors, the message will  
4 indicate that you will have to return to the courthouse  
5 sometime on Wednesday or Thursday for further proceedings.

6 For those jurors who will be asked to return later  
7 this week, let me tell you a little bit about what will happen  
8 between now and your return to the courthouse and what the  
9 process for the second part of the jury selection process will  
10 be.

11 After the questionnaires are completed, the  
12 questionnaires are copied, and they are going to be provided to  
13 the Court and to the parties. This will give the lawyers and  
14 the Court an opportunity to review them before we see you again  
15 so that we can move through the second phase of jury selection  
16 as efficiently as possible.

17 If you are asked to return on Wednesday or Thursday,  
18 you will initially report to this Jury Assembly Room, and, in  
19 all likelihood, you will see me again in my courtroom, which is  
20 Courtroom Number 1 up on the third floor. There, I am going to  
21 give you a sense of the schedule for the day and some  
22 additional preliminary remarks, and that we may have some  
23 follow-up oral questions for some of you about particular  
24 answers to the questionnaire.

25 That process will be conducted with a juror



1 individually but in public view in the presence of the counsel  
2 and the parties. Consequently, much of the questioning will be  
3 public, as it must be under the law. If, as I explained to you  
4 earlier, as a result of your request or my initiative, I can,  
5 if warranted, exclude from public view any sensitive matters  
6 that we discuss that you have asked not to be publicly  
7 disclosed, I will do so.

8 The initial two phases of this jury selection process  
9 are aimed at challenges for what we call "cause," that is,  
10 eliminating people from jury service who the Court determines  
11 cannot or should not serve on this jury for some reason or  
12 another.

13 The third and final portion of this process will be  
14 for the parties to exercise what are called "peremptory  
15 challenges." By law, each side gets an opportunity to excuse a  
16 small number of prospective jurors who are otherwise found to  
17 be impartial. It's an opportunity for the parties to have a  
18 role in the shaping the ultimate jury. Your answers to the  
19 questionnaires will provide the parties with information so  
20 that they can exercise those discretionary challenges. After  
21 the parties either exhaust their preemptory challenges or are  
22 satisfied with the jury, the jury will be sworn and seated for  
23 the case.

24 Trial is scheduled to begin next Monday, July 7th.

25 I want to tell you a little bit about the case, this

1 case of United States versus Tazhayakov. This is a criminal  
2 case. It is brought by the United States Government against  
3 the defendant, Mr. Tazhayakov. The Government in this case is  
4 represented by, and I will ask them to stand, Assistant United  
5 States Attorneys John Capin and Stephanie Siegmann.

6 MR. CAPIN: Good morning.

7 MS. SIEGMANN: Good morning.

8 THE COURT: The defendant, Mr. Tazhayakov --

9 And, Mr. Tazhayakov, if you could stand.

10 The defendant is represented here by his attorneys,  
11 Diane Ferrone, Matthew Daniel Myers, and Nicholas Wooldridge.

12 MR. WOOLDRIDGE: Good morning.

13 THE COURT: Please keep in mind that I give you this  
14 brief summary of the charges now so that you have some  
15 understanding of the Government's allegations against the  
16 defendant. However, I want to emphasize that the charges in  
17 the indictment are merely allegations. The indictment is a  
18 piece of paper that starts the process. It is not evidence.  
19 It is simply a description of the charges against the  
20 defendant.

21 Mr. Tazhayakov, like every other defendant in a  
22 criminal case, is presumed innocent unless and until the  
23 Government can prove beyond a reasonable doubt each essential  
24 element of the charges made against him. And that is not a  
25 mere formality or a technicality. It is a Constitutional

1 principle of the utmost importance.

2 The defendant has pled not guilty, and he denies  
3 committing the crimes that are alleged. The defendant is,  
4 consequently, presumed innocent, and he may not be found guilty  
5 by you, unless at the end of the trial the jurors unanimously  
6 find that the Government has met its burden of proving his  
7 guilt beyond a reasonable doubt, and that is a heavy burden.

8 I will instruct you about these principles in greater  
9 detail, but I want you to understand those fundamental  
10 principles that are the overarching architecture for criminal  
11 prosecutions in this country.

12 What is it that the Government has set out to prove?  
13 Mr. Tazhayakov has been charged by the Government with two  
14 violations of federal law involving what the Government says  
15 was a role in obstruction of justice in connection with the  
16 investigation of the Boston Marathon bombing.

17 In Count One, the Government alleges that  
18 Mr. Tazhayakov and one or more others were part of a conspiracy  
19 to, in the language of the statute, knowingly alter, destroy,  
20 conceal, or cover up tangible items belonging to Dzhokhar  
21 Tsarnaev. Mr. Tsarnaev has been separately charged in another  
22 case with the bombing itself.

23 And I want to emphasize that Mr. Tazhayakov is not  
24 charged in any way with being involved with the bombing itself.  
25 What he is charged with is obstruction of the following

1 investigation of the bombing.

2 In Count Two, the Government alleges that  
3 Mr. Tazhayakov engaged in obstruction of justice or aided and  
4 abetted in obstruction of justice, again, in connection with  
5 that investigation. And I want to underscore, again,  
6 Mr. Tazhayakov is not accused of being involved, himself, in  
7 the bombing. This is the follow-up after the bombing that the  
8 Government is alleging.

9 If you are chosen to be a juror in this case, you  
10 will, of course, hear much more about the charges that are  
11 alleged and about which the Government must prove, if it is to  
12 be successful, each essential element beyond a reasonable  
13 doubt, and I will explain to you what the elements of such an  
14 offense are.

15 These brief descriptions are just that; they are an  
16 effort to orient you to what the case is about in a general  
17 sort of way. But I want to stress again, and you will hear me  
18 stress it throughout, that they are only charges. They are  
19 allegations. They are nothing more.

20 The defendant, Mr. Tazhayakov, has pled not guilty to  
21 these charges, and he is presumed innocent. He may be found  
22 guilty only if the Government proves him guilty beyond a  
23 reasonable doubt. The Government bears that demanding burden  
24 of proof. Indeed, in our system of justice a defendant who is  
25 charged in our courts can simply sit back, look the Government

1 straight in the eye and say, "Prove it," and unless and until  
2 they do, the defendant cannot be found guilty.

3 Now, the defendant is under no obligation to submit  
4 evidence himself, but he may. He can also challenge the  
5 evidence, develop the case, challenge the Government's case,  
6 and in the end you will evaluate all of the evidence that is  
7 properly before you to determine whether or not the Government  
8 has overcome the defendant's presumption of innocence and has  
9 satisfied you beyond a reasonable doubt of the truth of either  
10 or both of the charges it now makes against the defendant.

11 The issue that I am sure many of you are most  
12 concerned about at this point is the commitment of time that  
13 will be required of you if you are selected to serve. Once the  
14 jury is selected and trial begins, and I assume or expect that  
15 we will start on July 7th, next Monday, we will be sitting from  
16 9:00 to 1:00 from Monday through Friday. We anticipate the  
17 case will not last any longer than three weeks, and, perhaps,  
18 less. That means it may extend into the week of July 21st. We  
19 will not sit in this trial on Friday, July 18th, because I am  
20 going to be holding court in Springfield that day. When the  
21 case is given to the jury for its deliberations, the jurors  
22 will do so for the full day, that is, roughly 9:00 a.m. to  
23 5:00 p.m., until the jury returns a verdict.

24 Now, the trial could be shorter than expected, and  
25 there is always some possibility that it could be somewhat

1 longer, but the Court and counsel will work very hard to ensure  
2 that it is not. My experience has been that I am very helpful  
3 with counsel in encouraging the case to be presented in a  
4 concise way.

5 As I suggested at the beginning of these remarks, I am  
6 not insensitive to the disruption that jury service can have on  
7 your daily lives and your routines, particularly given the  
8 expected length of trial in this case, which I should tell you  
9 is maybe roughly in the middle of the length of trials that are  
10 tried in this court, in the Federal Court. Some are much  
11 longer, some are shorter.

12 As I suggested at the beginning of this discussion,  
13 part of the reason that I make most of the trial days  
14 themselves for the receipt of evidence run only until 1:00 is  
15 to ease the disruption, as best we can, to mitigate it and give  
16 you an opportunity to return to your daily lives, at least for  
17 the afternoon. Even with this scheduling, I understand that  
18 for some of you the length of the trial will pose an extreme  
19 hardship, and you will have an opportunity to explain the  
20 circumstances to me, if that is the case, in the questionnaire.  
21 Although I will give serious consideration to a request to be  
22 excused from service based upon extreme hardship, I cannot tell  
23 you that you are necessarily going to be excused from jury  
24 service if you request it.

25 We all recognize the problems. It is also an

1 obligation that all of us, as citizens, have, and I will try  
2 and balance that as fairly as I can. We all recognize that  
3 service on this jury, like service on any other jury, will be  
4 an inconvenience in some way or other to anyone who serves, and  
5 I will need to balance your situation against the need for  
6 sitting a fair and impartial jury that is comprised of a fair  
7 cross-section of the community.

8 Now, although I have given you a brief outline of the  
9 charges in this case and you have not heard any evidence, it is  
10 still very important for me to emphasize again, and at the risk  
11 of being somewhat humorous, I hope, you will find me to be a  
12 little bit like the lawyer that the judges fear the most. It  
13 is the fellow who knows how to spell "banana" but does not know  
14 when to stop. I am going to be saying the same thing over and  
15 over again, because it is important and I want to emphasize it.  
16 And that is, in this connection, that do not allow yourself to  
17 be exposed to or have any discussion with any other person from  
18 this day forward regarding this case. This is necessary  
19 because a juror's decision must be free from outside influence.

20 As I said before, you may not discuss this case with  
21 any other persons. You may not discuss any matters related to  
22 it with any other persons until I excuse you or, if you are  
23 seated as a juror, the trial is completed. You may, as I said,  
24 mention that you reported to jury duty and, as may be  
25 necessary, discuss the schedule with your family or employer or

1 others so that they will know when you might not be available.  
2 However, you must not discuss this case, not even the nature of  
3 the case, whether it is civil or criminal, the names of the  
4 parties, or anything else, with anyone, including each other,  
5 until you are excused or the case concludes.

6 One of the things that you will learn about a trial is  
7 that the evidence comes in in bits and pieces. It is unfair to  
8 the parties for you to start discussing the case, even among  
9 yourselves, until all the pieces are assembled and you can see  
10 it in full framework. It is unfair to start developing  
11 provisional thoughts about it. You are here to receive all of  
12 that evidence.

13 My instruction to you that you may not speak to anyone  
14 about this matter includes any member of the media. Certainly,  
15 there is a legitimate public interest in this case. However,  
16 it would be improper for you to discuss this case or anything  
17 about it with them. If anyone approaches you to discuss this  
18 case, you must decline, politely, to discuss it. If anyone  
19 persists, and I do not think this is going to happen, but if  
20 anybody persists in asking you about it, please inform the Jury  
21 Administrator or my Deputy Clerk, Mr. Lovett, about that, and  
22 we will take the appropriate steps to deal with it.

23 In the same vein, I must remind you not to read, not  
24 to look at, or listen to any media reports about this case  
25 until you are excused. Take a vacation from the media. If you



1 should, by chance, encounter such a news story or newspaper or  
2 radio or TV matter or something on the Internet, for example,  
3 you must turn the page, change the channel, close the screen  
4 and bring it to the attention of the Jury Administrator, so  
5 that we can be assured that we have got people who are  
6 unpolluted by extraneous matters, by people who have not pulled  
7 down that mask that Lady Justice has over her eyes.

8 Similarly, do not make any use of any social media,  
9 Facebook, or Twitter or the like in a fashion that might relate  
10 to this case. When the trial is completed, you will no longer  
11 be subject to restrictions on commenting, but during the trial  
12 you must observe the rules regarding your duty not to discuss  
13 the case or be exposed to any discussion about the case. The  
14 reason, I think, is quite obvious. It would be immensely  
15 unfair to the parties for a jury to be exposed to discussion  
16 outside of the courtroom. The genius of the jury system and  
17 our trial is that all of the evidence is before everybody at  
18 the same time so that the parties can confront it and bring to  
19 your attention their refinements or their views about it. And  
20 if something is happening backstage or out of their view, then  
21 they do not have that opportunity to confront it. You would  
22 not want somebody talking about you behind your back, and if  
23 you were involved in a case as serious as this case, and every  
24 criminal case brought in the Federal Court is serious, you  
25 would not want a juror that was exposed to such backstage

1 discussions. Do not let yourself be involved in that. In  
2 fairness to the parties in this system of justice, you must not  
3 let yourself be exposed to any discussion of this case that  
4 does not occur in the courtroom and under the control of the  
5 Court.

6 So, let me recap today's schedule. Once you have  
7 completed and signed the questionnaire, please turn it in to  
8 one of the court staff. You will then be free to leave,  
9 bearing in mind my instructions, which I will not repeat again,  
10 about not discussing this case with anyone.

11 As you complete the questionnaire, please write and  
12 print clearly, answer every question completely. And,  
13 remember, there are no right or wrong answers to any of the  
14 these questions. There are instructions at the beginning of  
15 the questionnaire. Please follow those instructions.

16 As I was looking at the questionnaire this morning,  
17 one thing occurred to me that might justify a further  
18 instruction by me. There are references to whether you,  
19 yourselves, or members of your family, or close friends have  
20 been exposed to something or knew something or were involved in  
21 some particular kinds of activity or particular kinds of  
22 employment. Let me define "close friend." A "close friend" is  
23 someone who is close enough that they could effectively live  
24 with you, that kind of closeness. We are not talking about all  
25 your acquaintances, but we are talking about the people with

1       whom you have a special relationship when that phrase "close  
2       friend" is used.

3               The most important thing that you can do in completing  
4       the questionnaire is to answer all of the questions truthfully.

5               Because your answers to the questionnaires and  
6       throughout this jury process must be truthful and made under  
7       the pains and penalties of perjury, I am now going to ask my  
8       Deputy Clerk, Mr. Lovett, to swear you as the panel from which  
9       the jury will be selected in this case.

10              Mr. Lovett.

11              THE CLERK: Ladies and gentlemen of the jury pool,  
12       will you each rise and raise your right hand.

13                      (Jury venire complied)

14                      (Jury venire duly sworn by the Clerk)

15              THE CLERK: You may be seated.

16              THE COURT: Ladies and gentlemen, I am reminded, in  
17       listening to you, that one of the newest judges of this court  
18       took an oath here last Friday. We have three new judges coming  
19       on board, and Judge Indira Talwani took a public oath that  
20       required her to swear that she would do equal justice to all  
21       persons, rich or poor, accused or not. That is the kind of  
22       oath that you have just taken in this case.

23              I want to thank you for your attendance, for your kind  
24       attention to my remarks, for your attention to your duties with  
25       respect to the questionnaire. We are now going to adjourn this

1 proceeding for purposes of the attendance of the parties and  
2 counsel and me, and Mr. McAlear and the court staff will now  
3 distribute those questionnaires to you.

4 Thank you very much.

5 THE CLERK: All rise.

6 (The Honorable Court exited the Jury Assembly Room at  
7 9:40 a.m.)

8 IN COURTROOM 1:

9 THE CLERK: All rise.

10 (The Honorable Court entered the courtroom at 2:35 p.m.)

11 THE CLERK: This Honorable Court is back in session.  
12 You may be seated.

13 Court is back on the record in the matter of United  
14 States versus Azamat Tazhayakov, Criminal Action 13-10238.

15 THE COURT: Well, let me deal briefly, first, with the  
16 outstanding issues.

17 I will permit the Government to make reference to the  
18 defendant's statements in opening. That is as a result of a  
19 preliminary view that I have taken after review of the record  
20 here, but it is not the final determination, and the Government  
21 I think is on notice that they do so at their own peril if I  
22 strike the statements at a later point.

23 But we are faced, as we generally are, when there is  
24 not a determination on a Motion to Suppress, with the various  
25 competing considerations, one of them having to do with the

1 schedule in the case and my concern that further hearing at  
2 this point will generate publicity. Now, I have been pretty  
3 forceful, I think, with the potential jury about publicity.  
4 Perhaps the more prudent approach is not to stir things up  
5 further with preliminary testimony. I am prepared to revisit  
6 it, if we have some time and if it appears prudent to do it,  
7 before the jury is actually sworn.

8 But, in any event, the Government asked for some  
9 direction. That is the direction I can give you on that.

10 I have also received a corrected Government's witness  
11 list that has an individual on there that I had not brought to  
12 the attention of the jury venire. I will do that maybe in  
13 individual voir dire, rather than change things. It is very  
14 hard to make changes in the questionnaire afterwards, and I  
15 think it is contingent upon a motion that we have right now.

16 MS. SIEGMANN: I don't know how he fell off the list,  
17 your Honor, and we just learned of it recently.

18 THE COURT: Well, in any event, I think that, fine,  
19 and maybe I will skip the order that I was going to go in, at  
20 least, and outline what I hope to accomplish this afternoon.

21 I had the jury clerks do a kind of quick run-through  
22 of the questionnaires to see the degree of problematic answers.  
23 They did not do a thorough analysis, but they focused on  
24 questions of hardship and also questions about whether or not  
25 someone has been exposed to victims or has close relationships

1 to victims or matters arising out of the bombing itself, and a  
2 number of other things. I have told them to be quite liberal  
3 in their thought about that, because I think I will be quite  
4 liberal in this case, at least for purposes of any problematic  
5 answers. They have come up with over 100 questionnaires that  
6 have problematic answers, which, as far as I am concerned, in  
7 this case is probably a pretty good yield.

8 What I would be prepared to do, to save the parties  
9 some time, is just walk through some of the questionnaires and  
10 see if there is any objection to my excluding people for cause.  
11 I do not want to interfere with your making an independent  
12 judgment about that without even having looked at the  
13 questionnaires yet, but it may save you some time, it may not  
14 save you some time. It is really going to be up to you to  
15 think about what you want to do.

16 There were two individuals, however, who I did take  
17 action with or at least give direction to the Jury Clerk. One  
18 is a juror, she is Number 141, who is a technician with one of  
19 the TV stations. Her obligations are to provide technical  
20 support for this case, and, while she said she would do her  
21 very best not to listen to what other people had to say, I,  
22 frankly, will underscore this by saying I am very impressed, as  
23 I always am, by the candor of virtually every juror. There are  
24 a couple of wiseguys in every jury panel, but of people coming  
25 to grips with the questions and indicating their willingness to

1 do whatever the Court says, but also their willingness to  
2 recognize that they may have a particular problem.

3 In her case I told Mr. McAlear that she could be told  
4 that she was excused. I assume there is no objection.

5 MR. MYERS: No objection.

6 MS. SIEGMANN: No objection.

7 THE COURT: Then there is another juror, Number 15,  
8 who has a business trip on Wednesday, and she said if she would  
9 be called back she wanted to know if she could come back on  
10 Thursday. I told Mr. McAlear she could come back Thursday.  
11 That would take her out of the list that you have, but just so  
12 you know. I have not looked at either of their questionnaires;  
13 I am relying on Mr. McAlear's responses here.

14 But that brings me back to the question of the  
15 questionnaires that I have, you do not, in the sense that you  
16 do not have the discs at this point, and I am prepared to, but  
17 I leave it to you, whether or not, when we get through the  
18 other business that we have, we just start going through some  
19 of these questionnaires, which I will have to highlight for  
20 you, because there is only one copy now available until you get  
21 that. So, think about whether or not you are prepared to do  
22 that or you just want to go through this by yourselves.

23 I will tell you that what I really want you to do is,  
24 obviously, go through the questionnaires, agree upon those that  
25 you think we can exclude here based on the questionnaires, and

1 any that you agree upon I am likely to agree upon myself, and,  
2 as I said, I will use a fairly liberal view about excuses in  
3 this setting or challenges in this setting.

4 So, let us, then, turn to this question of excluding  
5 exhibits, which is the defendant's -- I do not have a number  
6 for it -- but a motion the defendant made styled "Motion to  
7 Preclude Certain Exhibits." I received, as I indicated this  
8 morning, the Government's opposition to it. I have tried to go  
9 through it as well as I can under the circumstances.

10 I guess my larger view about this is to ask why we  
11 would have to have the exhibits themselves rather than a  
12 narrative of the exhibits -- I will just start with that from  
13 the Government's point of view -- apart from the fact that the  
14 Government would like to use the exhibits themselves? But  
15 there are embedded in here things that I think can be  
16 inflammatory and distracting from the trial in this case, and  
17 so one of the ways in which I thought to deal with that is to  
18 say there can be, for example, references to the photograph of  
19 Mr. Tsarnaev and the backpack and another individual, but the  
20 photograph itself would not be shown, at least in the form that  
21 it exists now.

22 Now, there is an offer in the Government's submission  
23 to redact it. I am not sure what "redaction" might mean under  
24 these circumstances, if it would be like one of those pictures  
25 of the Politburo during the 1950s in which some poor member of



1 the Communist Party, who has fallen into disfavor, is whited  
2 out. But, in any event, I guess why can't we deal with it by  
3 narrative form, or at least have that as a default?

4 MS. SIEGMANN: Well, globally, just to talk about the  
5 exhibits, so the Government wants to put in evidence,  
6 obviously -- one of the key issues is what the defendant knew  
7 and when he knew it and what he did, and so, this exhibit  
8 shows, these documents show, first of all, his Internet  
9 history, what he was doing the moments before they go into the  
10 dorm room and the moments after.

11 THE COURT: I think I understand what the documents  
12 do. It can be done another way, and that is what I am asking  
13 about, with respect to at least ones that arguably come within  
14 the scope of 403 considerations.

15 MS. SIEGMANN: I guess the issue is -- obviously, you  
16 are making this determination -- but unfairly prejudicial.  
17 Many of these exhibits, again, go directly to the heart of the  
18 case and what the defendant knew and when he knew it. Many of  
19 these articles contain images of Tsarnaev that he was looking  
20 at, surveillance video that he was looking at that night over  
21 and over again. He was Googling.

22 THE COURT: Well, more accurately, although I am going  
23 to permit you to argue this at the appropriate time, more  
24 accurately, that these were sites that were visited by the  
25 computer that is associated with the defendant, unless there is

1 some other evidence about the defendant's actual observation of  
2 these sites himself.

3 MS. SIEGMANN: The Government will prove at trial that  
4 he was actually the one using the computer that evening, and  
5 that's the Internet history that --

6 THE COURT: Just kind of a sneak preview, how do you  
7 plan on doing that; that he was the one using it as opposed to  
8 one of his friends or others who were present?

9 MS. SIEGMANN: Well, first of all, we have the phone,  
10 the phone that was on the defendant. That is, obviously, a  
11 different issue. But when he gets back to the apartment at  
12 approximately 11:00 he signs onto WebAssign and does a homework  
13 assignment, and we have --

14 THE COURT: Can I just understand that? I want to  
15 understand the weight of the proof. As I said, I am likely to  
16 say that there is sufficient evidence from which a finder of  
17 fact could find that the use of his computer could have been by  
18 him, but I am now testing the weight of that evidence. So, you  
19 have him signing on, using a password or some mechanism to get  
20 to computer usage.

21 MS. SIEGMANN: His user name and that his assignment  
22 is due midnight that evening. It's actually Exhibits 162 and  
23 163, and the Government exhibits show the forensic examiner  
24 went into and did forensic analysis from the computer, and it  
25 shows the name that he signed in under, his name, "tazamat," it

1 had his special password, and that he worked on the assignments  
2 for at least five minutes. Interspersed with that were CNN  
3 inquiries that he was doing and he was looking at the  
4 surveillance images from the video from the sidewalk showing  
5 both Tsarnaev brothers.

6 In addition to that, we have VK account sign-ins under  
7 "tazamat" that are interspersed through that evening, again  
8 showing that the person that was using that computer, your  
9 Honor, was the defendant.

10 THE COURT: So, it is as I expected it to be, that  
11 there is sufficient evidence to justify that inference on the  
12 part of the jury. It may be an inference that is going to get  
13 challenged in some fashion, but that is where it stands.

14 Now the question is particular photographs, particular  
15 videos. Those are the ones I guess I am getting at, why it is  
16 that we cannot deal with some of those by simply having whoever  
17 the witness is who talks about this, and I suppose it is  
18 Agent Eppard?

19 MS. SIEGMANN: Special Agent -- I'm sorry. He's not a  
20 Special Agent. He is the Chief of the fbi.gov and Internet  
21 Operations. He only will be testifying to a small segment of  
22 the exhibits having to do with what the fbi.gov website looked  
23 like.

24 THE COURT: But there is somebody who is going to say,  
25 "I have reviewed this. Here is how I have gotten to this.

1 Here is how I evaluated this." And that person is going to  
2 say, "What did you see when you looked on that?", and he can  
3 say, "I saw a photograph of Tsarnaev and a photograph of the  
4 backpack."

5 Why wouldn't that be enough?

6 MS. SIEGMANN: There is also -- the forensic examiner  
7 will testify what was actually on the defendant's computer and  
8 the remnants of websites that he went to that night. He will  
9 testify about the texts on those websites that were accessed by  
10 the computer he would have seen. And that does go, your Honor,  
11 to knowledge. I mean, the issue is --

12 THE COURT: It certainly does. The question is we are  
13 talking about what the form of proof is going to be, that is  
14 what I am getting at, and whether or not particular photographs  
15 will be used or videos will be used in doing that.

16 One photograph, in particular, seemed to me to be  
17 quite inflammatory. It had circles around the relevant -- what  
18 the Government, anyway, thinks is the relevant part. It may  
19 have appeared on the Internet that way as well. But it seems  
20 to me one that I would be very careful about permitting it to  
21 be disclosed to the jury, and you recognize -- I should not say  
22 you recognize it -- but you have got a backup position, which  
23 is redaction. But I guess I am trying to deal with this  
24 universally. I will get to the particulars of them.

25 My default position would always be to let the

1 documents or photographs, if there is a reason to believe that  
2 the defendant reviewed them at the relevant time, come in; but  
3 I take a second cut at it, and that is the 403 cut at it, which  
4 is inflammatory, distracting, potentially redundant in various  
5 sorts of ways. And so, I do not know what the problem is with  
6 at least certain of those, and I will use the photograph as an  
7 example, doing it that way.

8 MS. SIEGMANN: Well, can I address your redundancy  
9 issue?

10 THE COURT: Not yet. Just assume that I have 403  
11 concerns, and I will, when I get to the defendants, get to very  
12 specifically which ones that I want to keep out, specifically  
13 keep out, because not everything, at least as I understand it,  
14 is going to be kept out.

15 But you are on your feet, so you have to answer the  
16 question first.

17 MS. SIEGMANN: Yes, your Honor. Well, the issue is  
18 that, in addition to proving his knowledge that his friend,  
19 Tsarnaev, was the bomber, we have to prove that he knew there  
20 was a bombing investigation, there was an investigation by the  
21 FBI. The fact that he was going onto multiple websites that  
22 evening and reading about the FBI's investigation clearly is  
23 relevant.

24 THE COURT: I am cutting you off, but with a purpose.  
25 Let's just talk about that particular photograph. If I say

1     that the photograph is inflammatory, subject to 403 exclusion  
2     in its current form, then it seems to me there is no problem  
3     for you to have a narrative: "What else did you see, Agent,"  
4     or whoever it is who is testifying to this. "Well, I saw a  
5     photograph, and the photograph had these things in it." Now,  
6     "these things" will be not all the things in the photograph as  
7     it presently exists. What is the problem with that?

8             MS. SIEGMANN: The other issue is, as the night  
9     progressed, the photographs became clearer and clearer, and  
10    that photo, in particular, isn't a very clear photo of  
11    Tsarnaev. I am not suggesting that the other photos aren't,  
12    but this one is, the circle around Tsarnaev's head -- and, by  
13    the way, that was not something that the Government did,  
14    obviously. That was something he got on the Internet in that  
15    fashion.

16            THE COURT: It was in that form when he saw it?

17            MS. SIEGMANN: Yes. And the way that we looked at the  
18    computer was what did he know and when did he know it? That  
19    was what he was looking at that evening, and that's how we put  
20    the exhibits together.

21            THE COURT: Let us just talk about the other  
22    individual who appears in that. I do not know what you mean by  
23    "redaction." Do you mean that all of a sudden it will become a  
24    portrait rather than a landscape photograph?

25            MS. SIEGMANN: That's what I was thinking about, is

1 doing it so that the picture would not -- it would not look  
2 like there was somebody whose face was redacted, essentially,  
3 because that would not be -- I just don't think it would be  
4 fair to anybody and I don't want to --

5 THE COURT: Well, it raises the continuing problem of  
6 telling somebody not to think about a pink elephant, at which  
7 point they think about nothing but a pink elephant. So, you  
8 obscure the face, and they ask, "What face is that?"

9 MS. SIEGMANN: That would not be our intention. Our  
10 intention would be to change that --

11 THE COURT: So, if I understand what the Government is  
12 saying, it is basically, "This is what the evidence will show,  
13 from our perspective, that Mr. Tazhayakov saw that evening,"  
14 and it would derogate from the integrity of the presentation of  
15 the evidence to cut and paste in some fashion, although you are  
16 prepared to do it on this particular piece.

17 Now let's deal with the question of the bombings over  
18 and over again.

19 We will get to -- I'm sorry, Ms. Ferrone.

20 MS. FERRONE: Okay. Your Honor, I just would want to  
21 speak to that photograph before you jumped ahead.

22 THE COURT: You will have time.

23 MS. FERRONE: Okay. Thank you.

24 THE COURT: The bombing --

25 MS. SIEGMANN: The 15th.

1 THE COURT: -- videos.

2 MS. SIEGMANN: So, on April 15th, the Government has  
3 put together, again, what the defendant knew and when he knew  
4 it, because before they go into the dorm room -- I know I'm  
5 going between dates, but I'm just trying to focus the Court's  
6 attention -- the testimony will be that he is contacted by  
7 Kadyrbayev and said, "You know, you need to come home now," and  
8 he didn't have a lot of time to do research before going into  
9 the room. He still did some. But what is in his mind at that  
10 point is the stuff that he had seen earlier in the week about  
11 the bombing and the fact that the bombing occurred, and that he  
12 actually did Google searches on his devices showing that he  
13 read articles. He viewed articles pursuant to the computer  
14 records, and, therefore, that's why those exhibits are also --

15 THE COURT: But let me just pause to deal more  
16 specifically with the question I raised, which is the videos.  
17 Do we know that he saw those videos?

18 MS. SIEGMANN: It was in what's called the "cache" or  
19 temporary files, which the forensic examiner will testify that  
20 that means that, since they were found there, that they were  
21 played on his computer.

22 THE COURT: In their entirety?

23 MS. SIEGMANN: Yes. It's only a six-second video,  
24 your Honor.

25 THE COURT: That is the only video that you plan on



1 playing with respect to the bombing?

2 MS. SIEGMANN: To the bombing. And then there's the  
3 bombing -- I'm sorry -- the surveillance video that was  
4 published by the FBI showing the two Tsarnaev brothers walking  
5 along the sidewalk.

6 THE COURT: Video?

7 MS. SIEGMANN: Video.

8 THE COURT: Did he see that?

9 MS. SIEGMANN: Yes. He watched it at least six times  
10 on YouTube.

11 THE COURT: All right.

12 So, Ms. Ferrone, let me hear from you on this. As you  
13 can see, I am focused very specifically on individual exhibits  
14 and not on the universe, although I am thinking about the  
15 universe in terms of alternative methods of presentation as to  
16 individual exhibits that may be problematic, and maybe the  
17 thing for us to do is go to particular exhibits that you have  
18 in mind here.

19 MS. FERRONE: Sure, your Honor. So, starting with  
20 what is --

21 THE COURT: I do not think there is any need for you  
22 to be here, Jim, at this point, unless there is something you  
23 want to report.

24 MR. McALEAR: No.

25 THE COURT: The next we will see you is probably with

1 two discs in your hand.

2 MR. McALEAR: Absolutely, your Honor. Thank you.

3 MS. FERRONE: So, starting with Exhibit 74, which is  
4 this highly inflammatory photo with the circles on it --

5 THE COURT: Hold on. I just want to get this in front  
6 of me.

7 MS. FERRONE: Of course.

8 THE COURT: I guess it was pulled out. Do we have  
9 the --

10 MS. FERRONE: It was Exhibit A to my motion, if you  
11 have that in front of you.

12 THE COURT: Right, I have that, but do we have it in  
13 the form that the Government is going to offer it? Because all  
14 I have here is just the Chrome cache file, or reference to the  
15 Chrome cache file.

16 MS. SIEGMANN: Would you like to use my copy, your  
17 Honor?

18 THE COURT: Yes, if you could pass it up.

19 MS. FERRONE: So, I have sort of three arguments that  
20 I would like to make as to why redacting this photo is not  
21 sufficient and why it should be excluded completely.

22 First, as Ms. Siegmann admitted, there are videos,  
23 videos and pictures of Mr. Tsarnaev and his brother walking on  
24 the sidewalk. We don't object to those videos. So, there are  
25 photos of Mr. Tsarnaev and video that we do not object to.

1           This picture -- second, your Honor, we have stipulated  
2           to the photographs that were released by the FBI. Ms. Siegmann  
3           made an argument that the photos get clearer. We stipulated  
4           that these photos came out in two sets. This photograph is  
5           entirely irrelevant and not necessary, because there's a lot of  
6           pictures that we don't object to that contain Mr. Tsarnaev.

7           THE COURT: So, your argument is one of redundancy on  
8           top of inflammatory. But it is unfairly inflammatory that we  
9           are concerned about.

10          So, let's assume that there is a redaction that just  
11          cuts a portion of it off. There is, I suppose, a portrait  
12          orientation that is quite narrow in its width, does it pretty  
13          effectively. What I assume is alleged to have been the  
14          backpack is on the same axis as the fellow with the white hat.

15          MS. FERRONE: Yes, your Honor, but in addition to 403  
16          prejudice, there is 403 misleading the jury. The Government's  
17          opposition paper says that this photograph shows the  
18          significance of the backpack that my client and Kadyrbayev  
19          chose to remove. Everyone in the world knows that the backpack  
20          that is circled in that photograph blew to smithereens. That  
21          picture is nothing but confusion to the jury and prejudicial.  
22          There's no need for it.

23          THE COURT: I do not know if I think that is the case.  
24          I think it is a powerful argument, "But, ladies and gentlemen  
25          of the jury, what are they showing you the backpack that was

1 obliterated for, except to somehow mislead you?" That is an  
2 argument. On the other hand, that backpacks are the means of  
3 conveyance for various kinds of contraband is I think relevant,  
4 or at least they can make the argument about that.

5 So, I do not see that as problematic. I see it as  
6 perhaps an opportunity for the defendant to make an argument  
7 about the Government misleading, but I do not see it as  
8 something I am going to exclude.

9 MS. FERRONE: Okay. And then, last, I will just add,  
10 again, there are probably half a dozen photos and a few videos  
11 that we don't object to that are in, and I just don't see  
12 including the ones that Ms. Siegmann mentioned, him and his  
13 brother walking on the sidewalk. We don't object to those --

14 THE COURT: We will go through all of them that are,  
15 from your perspective, problematic. But as I understand it,  
16 there are six or so that you do not object to; is that right?

17 MS. FERRONE: And perhaps even more. Perhaps even  
18 more. I just don't see why this one photo --

19 THE COURT: It is not overwhelming, it seems to me. I  
20 am likely to permit in photographs that a jury could find, not  
21 that they have to, but a jury might find are capable of -- or  
22 could have been viewed by Mr. Tazhayakov that evening.

23 MS. FERRONE: Can I add one last thing, your Honor?

24 THE COURT: Sure.

25 MS. FERRONE: As the Government's opposition papers

1 make clear, my client viewed this 5:00 a.m. on April 19th. We  
2 have already stipulated that he has seen clearer pictures of  
3 Mr. Tsarnaev that were released by the FBI at 2:00 a.m. I  
4 think that further supports that this picture is just  
5 completely unnecessary.

6 THE COURT: I overrule it. The stipulation is helpful  
7 sometimes, and sometimes it is sufficient, but I think the  
8 Government can be permitted to prove its case in its own way,  
9 subject to a scalpel on this picture.

10 So, what is going to happen, I think, is that the  
11 Government will redact it. It will be a very thin portrait.  
12 All that will be included will be the woman just to -- we  
13 assume Mr. Tsarnaev -- just to his left as we face him, and it  
14 will just be cut right up that side there.

15 MS. SIEGMANN: Yes, your Honor.

16 THE COURT: And the witness will be prepared to  
17 testify that this is a portion of a photograph that was viewed  
18 by the defendant at, I am told, 5:00 in the morning.

19 MS. FERRONE: Do you want me to speak to the videos  
20 now, your Honor?

21 THE COURT: I want to get through everything, so, yes,  
22 go to the videos.

23 MS. FERRONE: Okay. So, turning now to the exhibit --

24 THE COURT: I should pass this back, unless I should  
25 put it in my binder now.

1 MS. SIEGMANN: Your Honor, if you would like to keep  
2 it, you can have it.

3 THE COURT: At some point I want a full binder.

4 MS. SIEGMANN: I don't know how that was taken out of  
5 your binder.

6 THE COURT: Go ahead.

7 MS. FERRONE: So, turning, first, to Exhibit 56, the  
8 six-second video.

9 THE COURT: 56?

10 MS. FERRONE: Yes.

11 Your Honor, I am not going to pull any punches. This  
12 is a six-second video of one of the bombs exploding at the  
13 Finish Line.

14 THE COURT: But let me just ask the preliminary  
15 question. Do you dispute that this was viewed on some device  
16 of Mr. Tazhayakov?

17 MS. FERRONE: I can't speak for what the Government's  
18 expert is going to testify. I'm happy to hear what  
19 Ms. Siegmann has to say about that.

20 THE COURT: Well, that is what she told me.

21 MS. FERRONE: I don't recall when my client is alleged  
22 to have watched it, though, and I do think that that's  
23 extremely relevant.

24 MS. SIEGMANN: Can I explain the exhibit so that you  
25 understand?

1 THE COURT: Sure.

2 MS. SIEGMANN: On Exhibit 57 --

3 THE COURT: I thought Ms. Ferrone was referring to 56.

4 MS. SIEGMANN: She was, and I am trying to explain how  
5 you know what time he actually watched it. If you go to  
6 Exhibit 57, that is the records pertaining to the cache file  
7 pertaining to that video, and it shows that the path where it  
8 was found on the defendant's computer and the time that he  
9 watched it was on 4/15 at 4:16 p.m.

10 THE COURT: Accessed.

11 MS. SIEGMANN: Yes.

12 THE COURT: So, that is what the Government's proof is  
13 on this, I guess.

14 MS. FERRONE: I might be wrong, and I think  
15 Ms. Siegmann will correct me if I am, but I'm fairly certain  
16 that's two days before they allege the conspiracy began. I  
17 mean, I don't see how this is relevant. I think this is a case  
18 where the prejudice --

19 THE COURT: It is certainly relevant. It is relevant  
20 to his knowledge of the underlying circumstances with respect  
21 to the investigation. It is relatively close in time. It does  
22 not have to be evidence that was created or accessed during the  
23 period of the conspiracy. The process of developing the  
24 knowledge necessary to make a choice to join the conspiracy is  
25 relevant.

1 MS. FERRONE: I misspoke, your Honor. What I really  
2 meant to say is that any probative value is substantially  
3 outweighed by the prejudice here. I think your Honor said it  
4 perfect this morning. My client isn't charged with anything to  
5 do with the Boston Marathon bombing, and showing the jury a  
6 six-second clip --

7 THE COURT: Well, I do not think I said it quite that  
8 way, or if I did I was not quite meaning that. It is he is not  
9 charged himself in being involved himself in the bombing itself  
10 but is being charged with being involved in the obstruction of  
11 the subsequent investigation, and in order to understand the  
12 subsequent investigation it is necessary to understand what it  
13 was about. So, the question really is, from my perspective,  
14 whether or not it is unduly inflammatory.

15 MS. FERRONE: Your Honor, can I show you the video?

16 THE COURT: Yes, sure. But let me just say one of the  
17 things that will be on my mind, which is, the constant replay  
18 of the video or a video like this or bombing like this or  
19 anything like that, no. Not to be glib about it, I do not mean  
20 to be too glib, but this is not going to be Groundhog Day, when  
21 the Government presents evidence of the bombing itself. It is  
22 simply going to present, if it is permitted to, some evidence  
23 that shows the knowledge of this defendant regarding the  
24 circumstances that led to the investigation.

25 So, we have got a six-second video. I can take a look



1 at it.

2 MS. FERRONE: Your Honor, and I really don't want to  
3 belabor, because I really don't, but I'm really at a loss to  
4 see how this video is not extremely prejudicial, isn't going to  
5 inflame the jury.

6 THE COURT: "Extremely"? I do not want to fence with  
7 words, but the word is not "extremely." It is "unfairly."

8 MS. FERRONE: Okay.

9 THE COURT: So, the question is whether or not it is  
10 unfair to show what it was that caused the investigation in  
11 this form. So, if you want to show it, I will take a look at  
12 it.

13 MS. FERRONE: If I may approach?

14 MS. SIEGMANN: It is on the JERS disc.

15 THE COURT: It is easier to do it this way, I think,  
16 probably.

17 MS. FERRONE: Which way? Me approach?

18 THE COURT: You approach.

19 MS. FERRONE: Do you guys want to come up?

20 (Pause)

21 THE COURT: In this form does it stop as it appears on  
22 this thing?

23 MS. FERRONE: Yes.

24 THE COURT: So, it is the stop and start?

25 MS. FERRONE: Yes. Six seconds of explosion.

1 (Video clip shown to the Court)

2 THE COURT: I do not see a problem with it. So, I  
3 will permit the Government to show it on the basis that it was  
4 seen by the defendant here.

5 So, what additional exhibits do you want me to be  
6 dealing with?

7 MS. FERRONE: Your Honor, turning to the second video  
8 that the Government seeks to introduce, I believe it's 95.  
9 Yes. And this is an eight-plus-minute video, and it is --

10 MS. SIEGMANN: Your Honor, I don't think that it is  
11 necessary for us to play that video at the trial, so we will  
12 take that off our exhibit --

13 THE COURT: So, it is off the list. It is not in  
14 dispute.

15 Anything else by way of the motion that you have?

16 MS. FERRONE: Oh, certainly.

17 THE COURT: So, let us go through them. I have given  
18 you some idea of my approach. I am happy to go through any  
19 exhibit that you challenge, but you have got some sense of what  
20 may really be in dispute.

21 MS. FERRONE: Absolutely. Turning, your Honor -- I  
22 don't know if you have my motion in front of you.

23 THE COURT: I do.

24 MS. FERRONE: Section 2 is sort of the dozen-or-so  
25 articles and websites and the content of websites that the

1 Government alleges my client, you know, looked at.

2 THE COURT: Right.

3 MS. FERRONE: While I understand that their argument  
4 is --

5 THE COURT: It looks to me, if I am looking at your  
6 motion correctly -- I guess the motion itself -- I have been  
7 looking at the Memorandum -- but we have dealt with Section 2  
8 of the Memorandum, which is the photograph with circles on it.  
9 We have dealt with question of the videos of the explosion  
10 itself. Maybe they are not covered by Number 1 in your  
11 schedule.

12 MS. FERRONE: 1B is where I meant, really, starting  
13 with the Government's opposition.

14 THE COURT: Yes.

15 MS. FERRONE: So, this is a collection of -- it's sort  
16 of broken down into two sets. There are exhibits that show web  
17 pages visited by my client as well as Google searches conducted  
18 by my client, and then the second set is -- I think it's about  
19 at least half a dozen and I think more articles, the full text  
20 of articles that the Government wants to put into evidence, and  
21 you discussed earlier that why wouldn't a summary work. I  
22 really do think that the Government makes an argument that,  
23 well, the more and more articles he looked at bolsters the  
24 inference of his motive, and I think the exact opposite.

25 THE COURT: Knowledge, I think.

1 MS. FERRONE: Knowledge. But I think what the  
2 Government misses is that the more and more articles or  
3 websites that my client views actually supports the fact that  
4 he didn't read the entirety of the article or the full content,  
5 and I think submitting all of the content, I just think there  
6 is no basis for it, there is no basis of knowledge that my  
7 client read these articles.

8 THE COURT: That, again, is, to some degree, argument.  
9 But let me understand the amount of time that defendant spent,  
10 let us say, on Exhibit 61, which I think is one of the ones  
11 that is in dispute. We know his visit date and Eastern  
12 Daylight Time. Do we know how long he was on?

13 MS. FERRONE: I don't believe so. That's not evident  
14 on the face of Exhibit 61, your Honor.

15 THE COURT: So, Ms. Siegmann, do we know how long he  
16 is on?

17 MS. SIEGMANN: We have the time that he visited the  
18 site. We don't know how long he was on that particular site,  
19 your Honor.

20 THE COURT: What is the next site he visited?

21 MS. SIEGMANN: Well, the master spreadsheet is  
22 Exhibit 58, if you go to that.

23 THE COURT: So, we can look at that and see what he  
24 surfed to next?

25 MS. SIEGMANN: Yes, exactly.

1 MS. FERRONE: I can help you, your Honor.

2 THE COURT: Sure.

3 MS. FERRONE: If you want me to point on Page 7 of  
4 Exhibit 62 -- or, no -- of Exhibit 58, Page 7.

5 Right? Is that what you said, Exhibit 58?

6 MS. SIEGMANN: Yes, exactly.

7 MS. FERRONE: So, 58, your Honor, lists all of the  
8 websites that my client allegedly went to from 9:21 on.  
9 April 18th, to 1:20 a.m. on April 19th. If you flip to  
10 Page 7 --

11 THE COURT: Just so I am clear on this, what is the  
12 difference between 58 and 59 in that regard?

13 MS. FERRONE: Without speaking for the Government, 59  
14 are searches my client did. So, for example, if he went to  
15 Google --

16 THE COURT: So, Facebook kind of searches; is that it?

17 MS. FERRONE: Exactly.

18 THE COURT: Is that the distinction?

19 MS. SIEGMANN: But everything is on 58, your Honor.  
20 It's a master spreadsheet, and there's also a summary  
21 spreadsheet, but this is the master that shows all --

22 THE COURT: So, what is 59?

23 MS. SIEGMANN: 59 is just the specific search terms  
24 that he was searching that evening, so, if you want to see, you  
25 know, what he typed in and what he did at certain points in

1 time that evening.

2 MS. FERRONE: It's actually Page 8, your Honor. I  
3 misspoke.

4 THE COURT: I am going to have to count it, because  
5 the version I have I do not think is paginated. Is there a  
6 pagination on it?

7 MS. SIEGMANN: No, there is not.

8 THE COURT: So, I can count to eight. So, I am  
9 looking at --

10 MS. FERRONE: So, you see at the top, according to the  
11 Government's exhibit, at 20:08 and 57 seconds a.m., my client  
12 went to Fox News and that's the subject of 62, the example --  
13 or 61, rather, the example. Less than 20 seconds later he was  
14 on the Russian Facebook, VK. So, if you look four lines down,  
15 it says "VK.com."

16 THE COURT: Right. But it looks to me like he is  
17 still on Fox News through at least going to VK, and that is, as  
18 you say --

19 MS. FERRONE: Fourteen seconds.

20 THE COURT: From the start. But are these, each one  
21 of these Fox News references, the three separate ones at  
22 2:08:57, 2:09:09, 2:09:09, are they all separate screen shots?

23 MS. SIEGMANN: Yes, your Honor. And what the live  
24 video shows is, actually, he is watching the live video on Fox  
25 News, and there is a high likelihood that he had multiple

1 screens open at the same time. A lot of people do that, they  
2 will open different screens, and he could have been listening  
3 to the video at the same time that he is reading things on the  
4 computer.

5 THE COURT: So, 20 seconds of observation of multiple  
6 screens.

7 MS. FERRONE: Well, your Honor --

8 THE COURT: Let me just frame it. Then you can  
9 respond.

10 In that 20 seconds the Government's view is he would  
11 have seen and absorbed all of the information that is on this  
12 web text page? That is No. 61?

13 MS. SIEGMANN: Let me explain. This is the web page  
14 text that was actually saved on the computer and, again, in  
15 what is called -- they were actually able to recreate with a  
16 tool that they used. Not all of this, obviously, pertains to  
17 the bombing. On the top here in the first paragraph, that's  
18 likely that he saw, the Search for the Suspects, and that was.

19 THE COURT: Why do you say that? Because that is your  
20 theory of the case. But is there any reason to think that  
21 "Missing Student Holly Bobo Found By Dog" might have captured  
22 his attention?

23 MS. SIEGMANN: Because the breaking news was -- that  
24 was the breaking news, which it says, I believe at the top of  
25 the exhibit, it actually talks about the images -- the "FBI

1 identifies two suspects in the Boston Marathon bombings." The  
2 other stuff towards the bottom is likely on the bottom of the  
3 page and, again, is not associated with breaking news of the  
4 moment, which our argument would be that, if you look at the  
5 Exhibit 58, that's what he was doing that evening, looking at  
6 the breaking news relating to this one specific investigation  
7 repeatedly to see how close they were to the bombers.

8 THE COURT: Well, that is your argument.

9 MS. SIEGMANN: Yes.

10 THE COURT: My judgment is this is all argument, but  
11 fair argument. This is the screen. You can argue that he was  
12 interested in Holly BoBo and the dog or not, but that is part  
13 of the process of attempting to persuade.

14 MS. FERRONE: Your Honor, there are 17 exhibits that  
15 fall into this category. Are you inclined to let them all?

16 THE COURT: Yes, I am.

17 MS. FERRONE: You are?

18 THE COURT: I am, yes.

19 So, that, I think, deals with those exhibits. What  
20 else do we have? Are there other matters that we should be  
21 taking up on the defendant's motion?

22 MS. FERRONE: I guess the first aspect of argument one  
23 was our client's Internet history and the articles he viewed on  
24 April 15th, and while I understand that your Honor is now  
25 allowing the video, I do think the question becomes, well, how



1 much can they keep -- I mean, we are going to eventually get to  
2 the point where it is unfairly prejudicial, because everything  
3 is coming in, and I think --

4 THE COURT: No, that is not true. I am considering  
5 each of the exhibits that you are objecting to. I want to  
6 understand what you have to say.

7 So, now, I take it, you are focusing on the Internet  
8 history on April 15, 2013. What is the exhibit number I should  
9 be looking at?

10 MS. FERRONE: As a point of clarification, I think I'm  
11 confused, your Honor, because I thought a second ago, and if I  
12 misheard you, please let me know, I thought you said that all  
13 17 -- it's actually there were three I omitted to include, but  
14 I thought you said all 14 were now coming in.

15 THE COURT: On the basis of what I knew then. Now you  
16 are telling me you have got a different argument, I think,  
17 which is that there is too much of the same thing on April 15.

18 MS. FERRONE: No. There's actually too much of the  
19 same thing on April 19.

20 THE COURT: Right. But the first section of your  
21 motion is April 15.

22 MS. FERRONE: Correct, but the exhibit we were just  
23 looking at, 61, was actually April 19th. I started with that,  
24 because it's the more voluminous.

25 THE COURT: Right. My view is that, with respect to

1 April 19, I do not see any reason not to permit the Internet  
2 history, subject, obviously, to the arguments that can be made  
3 that the screen may have been dense and involved a variety of  
4 other things. There is no reason to believe, given the short  
5 time period here, that he was absorbing all of this  
6 information. You can argue that. The Government can argue it  
7 is the headline on this, it is the thing that changes every  
8 time on Fox News. So, for the 19th that seems to me to be  
9 appropriate.

10 MS. FERRONE: Okay. I just want to make one more  
11 point, just for the record, really.

12 THE COURT: Sure.

13 MS. FERRONE: These articles on the 19th have  
14 extremely -- very inflammatory material in them. I quoted some  
15 of it. "Lost limbs." If we have several articles within it I  
16 just think we are really bordering on allowing all these in  
17 that we don't even know for sure that he read, and now they  
18 have this content that is it unfairly prejudicial.

19 THE COURT: I guess I disagree, and I disagree for  
20 this reason: That part of the process -- the argument I guess  
21 the Government is going to be making is that this was an  
22 arresting circumstance, made arresting by the nature of the  
23 events, and so the things that you refer to are the things that  
24 might have caught people's attention generally, or caught the  
25 defendant's attention generally, and that is something that

1       they can argue.

2               But I go back to the point that we are not going to go  
3       redo videos of the bombing over and over again or other kinds  
4       of matters. We are talking about what we can say this  
5       defendant saw.

6               Now, the Government has withdrawn a longer video.  
7       Without having seen the longer video, I think they probably  
8       have acted prudently and in anticipation of what I was likely  
9       to do with it, so we are kind of shaving it down to the  
10      appropriate amounts. But it is not a sufficient answer to say  
11      there is a lot of this, the jury should not see it without  
12      considering what the defendant did, and that is the argument, I  
13      guess, the Government is making.

14              So, with that framework for analysis, what other  
15      exhibits should I be looking at?

16              MS. FERRONE: Okay. Just so the record is complete,  
17      there's Internet history and articles on April 15th. There are  
18      two exhibits that just show websites and searches my client  
19      conducted.

20              THE COURT: I appreciate there are two audiences here,  
21      me and the record, but I would appreciate it even more if you  
22      direct me to what it is that you might say at a later point was  
23      in the record that you want to have excluded.

24              MS. FERRONE: I'm not sure I follow your Honor, but  
25      Exhibits 52 through 55 we feel predate --

1 THE COURT: So, let's just look at them.

2 MS. FERRONE: Okay, sure.

3 THE COURT: 52 is the kind of overview, and then 53 is  
4 the queries?

5 MS. FERRONE: Correct, your Honor.

6 THE COURT: And 54 is a *News National Post* -- I am not  
7 sure -- a post of some sort that falls more or less in the same  
8 category, although it seems to have been almost exclusively  
9 related to the bombing at about the time or shortly after the  
10 bombing took place.

11 MS. SIEGMANN: The articles that are -- there's two, I  
12 believe. 54 and 55 are the texts of articles that are based  
13 upon his Internet history that he viewed that day, your Honor.

14 THE COURT: I guess, without, again, doing a  
15 fundamental analysis of the amount of time that he is on there,  
16 I am going to leave that to argument. If he is looking at this  
17 thing for ten seconds -- the article I am talking about is 54.  
18 Similarly the case with 55, although 55 has got some additional  
19 issues, including, "An April Fool's Prank That Will Scare the  
20 Crap Out of Your Teen," which may or may not have been the  
21 focus of his attention but is kind of available to argue about.

22 But as far as I am concerned, this is argument, that  
23 the kids surf on the Internet, they have a short attention  
24 span. I do not have to tell you all the arguments you are  
25 going to make, but they are going to make a somewhat different

1 set of arguments, and I am going to permit them to do it on the  
2 basis of this evidence, which is his Internet history and  
3 provides the inference that he was reading it for whatever  
4 period of time.

5 So, I overrule the objections to 51, 52 -- I guess it  
6 is 52 through 55.

7 MS. FERRONE: Okay.

8 THE COURT: What else?

9 MS. FERRONE: The next group of exhibits is Exhibits  
10 99 to 103, your Honor, the Government categorizes these as  
11 screen shots of FBI.gov. I mean, without belaboring the point,  
12 I just think at some point we are getting to the point where  
13 the Government is seeking to re-prove over and over the same  
14 thing. And, again, we have stipulated that the FBI released  
15 these pictures, we have stipulated that a video came out. I  
16 don't object to them playing the video of the two brothers  
17 walking on the sidewalk.

18 And now we are going to have the FBI.gov guy come and  
19 take the stand and say, "Well, this is how the web pages  
20 looked," and, "Oh, my gosh, he went to FBI.gov."

21 THE COURT: I do not think he will be saying, "Oh, my  
22 gosh."

23 MS. FERRONE: That's probably correct, your Honor.

24 THE COURT: The second time he will not be saying it.

25 MS. FERRONE: So, I just think at some point I would

1 hope that the Court would really draw a line here as to what is  
2 allowed to be introduced.

3 THE COURT: So, I am looking at 98 through --

4 MS. FERRONE: I think 99 through 103, but perhaps --  
5 oh, 98, your Honor. So, 99, 100 and 101 are actually all the  
6 same thing, as I wrote in the motion -- or am I talking  
7 about -- hold on. Let me get my bearings here.

8 Yes. So, Exhibits 99, 101 and 102 are cumulative, as  
9 all they show is that the same surveillance video was uploaded  
10 to the FBI, the web page. Exhibit 98 is a screen shot of the  
11 FBI surveillance video uploaded to You Tube. We don't object  
12 to that. I don't see how four exhibits showing that there was  
13 FBI footage uploaded is not cumulative. I don't see how that's  
14 not the case.

15 THE COURT: So, Ms. Siegmann.

16 MS. SIEGMANN: Yes, your Honor. So, if you go to  
17 Exhibit 64 -- I know we're jumping around here, but that is the  
18 entirety of his --

19 THE COURT: I am sorry?

20 MS. SIEGMANN: 64.

21 THE COURT: 64.

22 MS. SIEGMANN: That's the entirety of the defendant's  
23 Internet activity related to FBI.gov and YouTube, YouTube being  
24 the FBI video that they uploaded onto YouTube. I'll wait until  
25 you get there.

1           So, essentially, and this is -- so, that evening it  
2 shows from 11:05 p.m. to 12:00 the next day how much Internet  
3 activity the defendant was doing related just to the FBI.gov  
4 website. So, then James Eppard put together screen shots of  
5 what the website looked like exactly at that time when the  
6 defendant viewed them, and that's what the exhibits are.

7           THE COURT: So, let us go through them, if we can.

8           98 is not, I gather, in dispute. 99 is, to the degree  
9 that it is redundant of 100 and 101? Ms. Ferrone?

10          MS. FERRONE: Yes, your Honor. Sorry. So, yes, 98  
11 through 101, in my opinion, are four of the same exact thing.

12          MS. SIEGMANN: But they are not. They are different  
13 web pages, your Honor, and that's why there's different ones.

14          THE COURT: So, I am just looking at them right now.  
15 They appear to be different, although the top in 99 and 100 is  
16 the same, but then 100 adds five more pictures.

17          MS. SIEGMANN: Because it's a different picture on the  
18 website, your Honor. That's why there's different ones. 99 is  
19 the FBI.gov home page, and then 100 is actually the Boston  
20 Marathon page of the FBI.gov website.

21          THE COURT: So, let me ask in this limited number of  
22 exhibits my Groundhog Day question. Why isn't this Groundhog  
23 Day?

24          MS. SIEGMANN: Well, your Honor, again, if we are to  
25 trying to establish, as we are, the knowledge of the defendant,

1 what he was looking at that evening when they were deciding to  
2 get rid of that backpack and throw it into the garbage  
3 dumpster, the fact that he was repeatedly going onto FBI.gov,  
4 and specifically on six occasions that day watching the YouTube  
5 video -- I mean, it's one thing for the defendant to say, "We  
6 stipulated to the video and the pictures that were released by  
7 the FBI." It's quite another for the Government to prove that,  
8 indeed, this defendant watched that video several times and  
9 looked at the pictures associated with --

10 THE COURT: Will they say that he actually watched the  
11 video as opposed to simply looked at the page itself?

12 MS. SIEGMANN: The testimony will be from Special  
13 Agent Scripture that these YouTube citations at 11:05 and  
14 11:17, the earliest of those, is that when you go on there it  
15 automatically plays.

16 So, the fact that he went to this YouTube website with  
17 this specific number, which is associated with the FBI video,  
18 that video automatically plays, and that's going to be the  
19 testimony, and that he did that over and over again, and in the  
20 files on the computer there is remnants of not the entirety of  
21 that video but about 22 seconds of it.

22 THE COURT: Why is it just 22 seconds?

23 MS. SIEGMANN: We believe because the frames are  
24 slightly different, and this is the cache file, so the cache  
25 file might not have saved the entirety of the video because of



1 space issues as well on the computer.

2 THE COURT: All right. I will let them have that.

3 MS. FERRONE: All of them?

4 THE COURT: Yes, all that have been marked here and to  
5 which you have expressed directly an objection.

6 Now, what else in terms of the exhibits?

7 MS. FERRONE: I don't know if we were just talking  
8 about 99, 101 and 102, which are identical.

9 THE COURT: Not quite identical. They are different  
10 times of the screen shot, so it is not quite fair to call them  
11 "identical," but as a shorthand I suppose that will work.

12 MS. FERRONE: Okay. I further object to Exhibits 100  
13 and 103. This is very similar to my earlier arguments. It  
14 contains the text of articles which, apparently, my client was  
15 watching videos over and over and over and was also reading  
16 articles. I don't see how that can possibly be the case, your  
17 Honor. So, just like all the April 19th articles that I highly  
18 doubt my client read every word of --

19 THE COURT: Just so I understand, you said that 100  
20 and 103 --

21 MS. FERRONE: 100 and 103. They are also FBI, but  
22 they are different than the upload of the video. They're the  
23 text of articles on the FBI website.

24 THE COURT: When you say "article," just the text of  
25 whatever they were posting on the --

1 MS. FERRONE: Correct, your Honor. So, that's 100 and  
2 103. So, again, apparently while my client was watching videos  
3 over and over and over, he was also reading the texts of the  
4 articles on the FBI. I find that really incredible.

5 MS. SIEGMANN: Exhibit 100 is the screen shots we were  
6 just talking about. That's showing the images, your Honor.

7 THE COURT: It has got how can you can join the JTTF  
8 -- well, not how you join it, but what it is about.

9 I am not going to exclude this. I can think of  
10 arguments, and if I can with my limited capacity, you can with  
11 much greater ability.

12 Any other specific ones you want me to look at?

13 MS. FERRONE: I missed your ruling. I take it, I lost  
14 on that one?

15 THE COURT: Well, do not think of it as a loss. Think  
16 of it as some direction on how the case is going to pursue.  
17 Maybe you can call it a "loss" if you want to, but I would not.

18 MS. FERRONE: Okay. I think that's everything from my  
19 motion. Thank you, your Honor.

20 THE COURT: All right. So, I think I have dealt with  
21 every exhibit to which I have been directed here, and the  
22 rulings will stand. The overarching concern I have is to avoid  
23 unfairly inflammatory or redundant or misleading testimony.

24 I do not think what I have been pointed to does that.  
25 Of course, I retain the right to look at this as it actually

1 comes in during the course of trial, but the defendant wanted  
2 some idea of what I was going to do, and this is what I  
3 presently intend to do on that.

4 So, I have ruled on -- and I am not sure what the  
5 number is because I got it hot off the press without looking at  
6 CM/ECF -- but I have ruled on the defendant's Motion to  
7 Preclude Certain Government Exhibits.

8 Now, the next issue I think is the Kumiskali  
9 deposition, and I think we have to walk through that step by  
10 step.

11 I note that you were passed a copy of the juror list  
12 and the disc here, and maybe you will want to check the disc  
13 right now, and we will take a break so you can check the disc,  
14 to make sure that you all are able to use it and look at it,  
15 and then we will come back and deal with the Kumiskali  
16 deposition.

17 MR. CAPIN: Thank you, your Honor.

18 One thing, because of timing, we haven't had an  
19 opportunity to express or to move on objections we have to the  
20 exhibits identified by the defense. I don't know if you want  
21 us to take that up orally, or if we would have a chance to  
22 brief it.

23 THE COURT: Well, as I will tell the jury, the lawyers  
24 are very quick, I am slow, but steady, and so I need it in  
25 writing so that I can slowly but steadily absorb the

1 information and make my decision. So, in writing.

2 MR. CAPIN: Would it be fine if we get that to you by  
3 tomorrow, your Honor?

4 THE COURT: Yes, that is fine.

5 MR. CAPIN: Thanks.

6 MS. FERRONE: And we will have a brief opportunity to  
7 respond, your Honor?

8 THE COURT: Yes.

9 MS. FERRONE: Thank you, your Honor.

10 THE COURT: It is not going to be a pop quiz, but we  
11 are moving fast now, so I want to get this taken care of.

12 Why don't we take, let's say, a 15-minute break. You  
13 can check this. Then we will go to the Kumiskali deposition.  
14 Then we can talk about whether or not you want to go through  
15 these questionnaires that the jury people thought might pose  
16 some sort of problem, or not. You may just want to get going  
17 yourselves and take a look at the questionnaires and start to  
18 develop your own views about it.

19 MR. CAPIN: Perhaps on the break we could consult  
20 among ourselves on that issue.

21 THE COURT: Sure. So, we will be in recess for 15  
22 minutes.

23 THE CLERK: All rise.

24 (The Honorable Court exited the courtroom at 3:35 p.m.)

25 (Recess taken)

1 THE CLERK: All rise.

2 (The Honorable Court entered the courtroom at 3:50 p.m.)

3 THE CLERK: This Honorable Court is back in session.  
4 You may be seated.

5 THE COURT: Just for scheduling purposes, what is the  
6 parties' preference on the questionnaires? Do you want to get  
7 at them yourselves first, is that it, or what?

8 MR. CAPIN: If we understand correctly -- and I think,  
9 first of all, I think we're all able to open the discs. That's  
10 not an issue. If we understand correctly, the Court has made a  
11 preliminary cut on some of the --

12 THE COURT: I had not so much as the Jury Clerks were  
13 directed to look at potentially problematic questions, really  
14 Question 15, which is a question having to do with schedule,  
15 and then the 40 range, which are, "Can you follow the  
16 instructions," that sort of thing, "Do you have such strong  
17 views that it will interfere."

18 They culled them out and just brought them to my  
19 attention so I would get a chance to look at them. I have done  
20 a preliminary look at them but nothing so thorough that I would  
21 feel comfortable doing anything without the approval of  
22 counsel.

23 The day has moved quickly. What I thought, after  
24 looking at the clock, is, I will go down a list of the ones  
25 that the Jury Clerks have found problematic. That may or may

1 not lead to strict scrutiny on your part as opposed to some  
2 sort of intermediate scrutiny of the questionnaires, but it is  
3 really up to you.

4 This part of the process is really to see if we can  
5 agree on people that I am simply not going to invite back for  
6 Wednesday, when we would start talking with specificity about  
7 questions.

8 MR. MYERS: I suggested to Mr. Capin that we just cull  
9 out as many as possible and take the physical copy, he and I,  
10 and sit here for an hour and try to rid ourselves of 50 or 75  
11 of those that are pretty obvious.

12 THE COURT: Well, I think so, but I think I would like  
13 you to use the discs. I want to hold onto the physical copy.  
14 I have no objection to you using the courtroom to do it. But I  
15 am going to be looking at them too, and there is only one  
16 physical copy.

17 MR. CAPIN: We both had some impression that we would  
18 be doing something more substantive on the specific flagged  
19 jurors, but you are suggesting, then, we will simply lead with  
20 the list of ones that might require some level of scrutiny  
21 other than --

22 THE COURT: Right. I was going to do it, since we had  
23 some downtime, but it is not down anymore, or at least it has  
24 been consumed to some degree. But to save you time about what  
25 I was going to talk about or work my way through is, I will

1 just give you the numbers where flags were raised, and then you  
2 can deal with it.

3 MR. MYERS: Yeah.

4 THE COURT: As I say, it was the range from 100 to  
5 120. You will understand my view that I am going to be quite  
6 liberal in treating a challenge for cause here to try to get  
7 down to a manageable number of people, because those that we do  
8 not challenge for cause are those people that I am going to be  
9 asking questions of, and I really do not want to spend a lot of  
10 time asking questions of people who are not likely to be on the  
11 jury, and when you are reading between the lines you can see  
12 problematic kinds of things. I have been very impressed. I  
13 have gone through I think almost all of them very quickly, but  
14 I have been very impressed with the candor and thoughtfulness  
15 that we have here, but once looking at candor and  
16 thoughtfulness, you may both decide that that is also grounds  
17 for cause.

18 MR. CAPIN: Thank you, your Honor.

19 THE COURT: So, let us talk about the Kumiskali  
20 deposition. I just want to page through to the actual  
21 objections on the portion that was provided to me. The first  
22 shows up on Page 9. Here we have this question of Page 9 of  
23 the transcript referring to Page 19 of the deposition. We have  
24 this back and forth about lack of foundation here. I suppose  
25 someone could have tied it down by saying, "Did you see them go

1 to the gym? Did you see them play Xbox together?"

2 But is this really an issue, a foundational issue?

3 MS. FERRONE: Your Honor, Ms. Kumiskali testified  
4 earlier in her deposition she really was only there on the  
5 weekends, so that is sort of why we thought that she really  
6 didn't have the knowledge or that there was a foundation to  
7 really say that she could speak to a relationship between my  
8 client and Jahar.

9 THE COURT: The basis of this question is not enough.  
10 I am excluding it. So, that excludes Lines 9 through --

11 MR. CAPIN: Well, your Honor, if I may?

12 THE COURT: All right.

13 MR. CAPIN: If I understood the Court correctly, you  
14 would consider as foundational material stuff that is, for  
15 example, in a 302?

16 THE COURT: I might, yes.

17 MR. CAPIN: Well, in the 302, the very first interview  
18 of Kumiskali, she says the following things: She says that she  
19 and Tsarnaev and Azamat were on a shared phone plan, which I  
20 think he then says a --

21 THE COURT: No, I am dealing with these specific  
22 things. If it is going to be a general relationship, that is  
23 fine, but not for Xbox and the general relationship between  
24 Tazhayakov and Tsarnaev being similar to Kadyrbayev. So,  
25 unless it is much more specific than that, I am not sure I want



1 to hear it.

2 MR. CAPIN: Well, I mean, she says that she's aware  
3 that they go to parties together, they play soccer together.

4 THE COURT: "She's aware"? What does that mean? I  
5 also am aware. I would not be a particularly good witness on  
6 this.

7 MR. CAPIN: I understand the point, your Honor.

8 THE COURT: So, we are excluding Lines 9 through Line  
9 14.

10 Turning to the next page, which is Page 10, we are  
11 dealing with the objection to on Page 21 -- here, I guess my  
12 problem with this one is I do not know what else we have got  
13 regarding her being present with Mr. Tazhayakov on April 15th.  
14 Mr. Kadyrbayev and Adlet picked her up, but there is nothing  
15 else that really ties to Mr. Tazhayakov. So, I am going to  
16 exclude all of that. That is, all of Page 21 is excluded.  
17 Actually, I think I am going to let Lines 1 through 3 come in.  
18 It just ties in better with Page 24 there, and the transition  
19 would be difficult, but just to show that she met with him that  
20 day and she next saw him on Thursday, and around 2:00 may or  
21 may not mean they knew something about what was going on.

22 So, the next set is starting at Page 16, going over to  
23 17. I am not sure I understand the defendant's response here.  
24 "804(b)(3)"? What does that mean?

25 MS. FERRONE: Yes, your Honor. 804(b)(3) is an

1 exception to the hearsay rule, and it basically has two prongs  
2 to it; that it is a statement by the declarant against the  
3 declarant's interest, and that there is some staple of trust or  
4 corroboration.

5 Here, your Honor, obviously the content of the  
6 statement here is against Mr. Dias's (sic) interest, and the  
7 reason --

8 THE COURT: Well, but it is not *his* interest. We are  
9 concerned with Ms. Kumiskali's interest.

10 MS. FERRONE: Well, but she is testifying about what  
11 Mr. Dias said to her.

12 THE COURT: I see. Go ahead.

13 MS. FERRONE: That's okay. And when you have an  
14 exception to the hearsay rule, the reason why we have  
15 exceptions is because there are these telltale signs of  
16 reliability. Ms. Kumiskali was Dias's girlfriend since they  
17 were, like, eight years old. So, here this is a classic  
18 example of where there's corroboration and a relationship of  
19 trust, where the declarant is saying something that can be  
20 relied upon because of who they are saying it to. And I think  
21 here 804(b)(3) is satisfied on both prongs. It's obviously a  
22 statement against Mr. Dias's interest, because he is talking  
23 about fireworks and a backpack, and the person he is saying it  
24 to is someone he has known since he was a kid and has dated  
25 seriously for many years, supports the telltale signs of

1 reliability to warrant an exception to the hearsay rule.

2 THE COURT: Well, I think I understand that. I am not  
3 sure why the defendant would want it in.

4 MS. FERRONE: No, we are trying to -- yeah, we want it  
5 in. Without talking about my defense, we want it in.

6 THE COURT: Which is another way of saying why does  
7 the Government want it out?

8 (Laughter)

9 MR. CAPIN: Well, it may be a baby-bath water thing,  
10 your Honor. I guess there are two points with regard to this  
11 passage. First of all, if you look at Page 64 from Line 19 on,  
12 those are not Mr. Kadyrbayev's words.

13 THE COURT: Now I am focusing more specifically on  
14 Ms. Kumiskali's present-sense impression when she heard the  
15 words that Mr. Kadyrbayev was saying. It suggests a  
16 recognition, even by someone who is not a co-conspirator, of  
17 the inculpatory character of the materials.

18 MR. CAPIN: It does that, and I think the first few  
19 lines serve that purpose, but everything beyond that is merely  
20 hearsay by Ms. Kumiskali, not subject, certainly, to 804(b)(3).

21 THE COURT: Well, but why isn't it inculpatory of at  
22 least Mr. Kadyrbayev and, consequently, a statement against his  
23 interests, and he is confronted with someone who is very upset  
24 about this stuff, and she says he seems to be kind of unable to  
25 understand what she's saying. But I am not sure that this is

1       excludable on that ground.

2               MR. CAPIN: Well, in essence, it is an adoptive  
3       admission you are saying, so it is --

4               THE COURT: No, I am not saying that at all.

5               MR. CAPIN: I'm sorry, then I don't understand.

6               THE COURT: I am not saying that at all. I am saying  
7       that she has this conversation with Kadyrbayev. He says  
8       something about fireworks in the backpack. She decides to  
9       speak in Russian, not in English, and that conversation focuses  
10      on precisely the kind of evidence that the Government is going  
11      to try and introduce in this case to show an awareness and an  
12      act on the part of the defendant.

13              Apart from expressing my surprise at the respective  
14      positions, and I read it twice to make sure that it was a  
15      Government objection, not a defendant's objection, in this  
16      posture I would let it come in.

17              MR. CAPIN: I understand that. And if I may explain,  
18      because it may preview some of the argument you'll hear on  
19      another example.

20              This same line of question and answer of Ms. Kumiskali  
21      occurs later in the transcript, and at that point it appears --  
22      it allows for an inference that it was Kumiskali and Kadyrbayev  
23      who came up with the idea of tossing the backpack. It is that  
24      inference that is uncorroborated, and I think defense counsel  
25      correctly points out that the case law under 804(b)(3) says

1       that it comes in, but there has to be corroboration on the  
2       specific point.

3               THE COURT: Well, but there is corroboration here,  
4       isn't there? He shows up and tells her he is taking a  
5       backpack, and you have got evidence that the backpack was  
6       taken. So, there is corroboration with respect to this  
7       particular one.

8               MR. CAPIN: This particular statement. I think you  
9       will hear an objection from the Government later where there  
10      are exchanges that suggest that she told him to get rid of the  
11      backpack. It was a conversation between the two of them, I  
12      suspect we will hear from defense counsel at trial, exclusive  
13      of the defendant in this case.

14              THE COURT: Well, let me deal with them step by step.  
15      As to this one, I am overruling the objection of the  
16      Government.

17              Now I am turning to Page 21, which deals with Pages 74  
18      through 75. I am not sure I understand about the effect on the  
19      listener, but isn't this a description of the circumstances in  
20      the apartment during a relevant time, and is it admissible on  
21      that basis?

22              MR. CAPIN: The problem here is that, because this is  
23      so out of context, I'm not sure what this tells the jury about.

24              THE COURT: They know it is a very small apartment,  
25      and that she hears doors opening, and she is spending time with

1 Mr. Kadyrbayev in the bedroom, with him being gone for some  
2 period of time. That is what she observed.

3 MR. CAPIN: And we are talking, your Honor, about  
4 Page 74, I take it?

5 THE COURT: Yes, Page 74. The first of these  
6 objections.

7 MR. CAPIN: Frankly, we withdraw that objection.

8 THE COURT: So, that can be permitted.

9 MR. CAPIN: It is the next one that is precisely the  
10 point I made a moment ago, your Honor.

11 THE COURT: So, here we are. This is one I was kind  
12 of surprised at.

13 "What, if anything, did he say to you?"

14 "He just said, like, no more backpack."

15 If you tie Mr. Kadyrbayev to Mr. Tazhayakov on that,  
16 that is inculpatory on both of them. I just do not see what  
17 that -- "I just said, 'Where is it?' And he said, 'Like, far  
18 away.'" I don't understand --

19 MR. CAPIN: We will withdraw that objection, your  
20 Honor.

21 THE COURT: So, that one can be included. Now we get  
22 to -

23 MR. CAPIN: And I think, your Honor, if I may, because  
24 the next objection was -- the Government objection assumed that  
25 if what preceded came out, then it should be as well.

1 THE COURT: So, this is withdrawn, I take it --

2 MR. CAPIN: Yes.

3 THE COURT: -- on the basis of the ruling that I just  
4 made.

5 So, then we go to Page 26.

6 What is the Government's objection here? I am not  
7 even sure it is hearsay.

8 MR. CAPIN: Well, it's hearsay and relevancy. There  
9 is a call to somebody named Vovka (ph) who we don't know from  
10 any other context, and the witness relays, in essence, the  
11 substance of the phone call. That is Lines 19 through 21.  
12 That is hearsay.

13 THE COURT: Why isn't it notice? They call Vovka.  
14 Vovka says that there are police officers who wanted to talk.  
15 I generally look at objections not as a take-home exam in  
16 evidence, but why would anyone care?

17 MR. CAPIN: Well, that's a separate question.

18 THE COURT: Right. Well, it is, but I ask it to  
19 understand the lack of inculpatory quality, whether or not it  
20 is hearsay. What this appears to be, if I were parsing it  
21 through, is to say Azamat learned that there were police  
22 looking for him at that point. Whether they were or not -- I  
23 think I know, but the evidence will tie into that.

24 MR. CAPIN: Well, it's certainly not relevant -- I am  
25 not sure what fact at trial this tends to make more or less

1       likely, but at this point in the narrative the backpack has  
2       been taken away, the crime is, in essence --

3               THE COURT:   You mean is the conspiracy over at this  
4       point?

5               MR. CAPIN:   No, it's not.

6               THE COURT:   So, they are planning -- if the Government  
7       were arguing this another way, they are in the process of  
8       thinking how they deal with the various challenges they  
9       confront by the advent of police officers.

10              MR. CAPIN:   We are going to withdraw that objection.

11              THE COURT:   All right.   Now, I am not sure why the  
12       next two on 82 should be excluded.   She is asked to be more  
13       specific.   She indicates shortcomings in her memory.   That  
14       seems to me to be appropriate to understand what was said  
15       earlier.   Again, I am not sure why what was said earlier helps  
16       you, but that is your hunt, not mine.

17              MS. FERRONE:   One moment, your Honor.

18              THE COURT:   Sure.

19              MS. FERRONE:   I think we felt that this was hearsay  
20       because Ms. Kumiskali is testifying to statements made by  
21       others.   I apologize, your Honor.

22              THE COURT:   I will apply the long-standing principal  
23       of sauce for the gander.   You have got this thing in over the  
24       Government's now-withdrawn objection.   It seems to me it ought  
25       to be understood fully.



1 MS. FERRONE: I think what we really thought is that  
2 this entire answer by Ms. Kumiskali is nonresponsive to the  
3 question. She is asked to tell exactly what was said and who  
4 said it, and yet that's not what her response is.

5 THE COURT: Well, she says it wasn't very clear, and  
6 she doesn't know whether it was before the police or after the  
7 conversation or what it is. The jury will make of her memory  
8 what they will, but this took place after they announced the  
9 name that it was Dzhokhar.

10 MS. FERRONE: Okay, yeah. And then, just for the  
11 record, I do think this is hearsay, because she is actually  
12 asking what others said versus what she observed. I think  
13 that's a little bit different.

14 THE COURT: The only reason what others said is  
15 hearsay is if it is offered for the truth of the matter. It is  
16 not hearsay otherwise, and here it does not appear to be  
17 offered for the truth of the matter, at least if I am to  
18 understand your response to the Government's objection to the  
19 previous one.

20 MS. FERRONE: Okay. Thank you.

21 THE COURT: So, I think I am going to overrule, to the  
22 degree that you continue to press them, the first two  
23 objections on 82.

24 This is hard to follow. If there were an objection  
25 based on perplexity, then I would sustain it, because I am

1     perplexed. This is her trying to talk about the conversation  
2     that we got in here before, and perhaps adding some further  
3     enlightenment, but probably not, but that is for the jury to  
4     decide. At least they should understand that when she says  
5     something it may not be with the rigor of a biochemist.

6             But is there anything else? So, I am overruling those  
7     objections as well.

8             Then we get to the next page. It says she is  
9     describing a conversation with Mr. Kadyrbayev and  
10    Mr. Tazhayakov that she observed or heard. I do not know what  
11    the objections could be here, now that we have got this thing  
12    in. So, I am going to overrule those objections, unless there  
13    is some further argument to be made beyond this.

14            Then we get to Page 83. I think that this goes beyond  
15    what is before the jury in this.

16            MS. FERRONE: Your Honor, may I be heard?

17            THE COURT: Do not stand up. I am about to sustain  
18    your objection.

19            MS. FERRONE: Oh, I'm sorry. I apologize. Sorry.

20            THE COURT: This is saying that the conversation  
21    between Azamat and Dias was about how they were going to  
22    explain their actions concerning the backpack to the police,  
23    and then brings Mr. Phillipos in for good measure. But I do  
24    not see this as anything other than the kind of leading  
25    question that I would not otherwise permit.

1 Is there something more here?

2 MR. CAPIN: No, your Honor.

3 THE COURT: So, I am sustaining the objection to  
4 Page 83, Lines 11 through 15.

5 THE COURT: Then we go to Page 88.

6 These attestations or vouching or descriptions of  
7 someone's religious beliefs, political beliefs, anti-American  
8 beliefs, seem to me to be unballasted here. They are the kinds  
9 of opinion, observations that I would not let witnesses get  
10 into without something more substantive. So, I am going to  
11 sustain this objection.

12 MS. FERRONE: Two seconds to make the record? I'm  
13 sorry.

14 THE COURT: Sure.

15 MS. FERRONE: The reason why I think this is relevant  
16 is that, your Honor, there's a lot of argument about knowledge  
17 here and what my client's knowledge was, whether he had a  
18 conversation with Jahar, and that shows his knowledge, and this  
19 sort of -- this goes -- one of those things could be their  
20 fate. One of the things that supports their friendship was  
21 maybe not whether or not they had a conversation about what  
22 Jahar learned in Chemistry, but the fact that they didn't talk  
23 about religion.

24 So, I actually think this does support the friendship  
25 and --

1 THE COURT: They did not talk about religion? Here  
2 the question is, "Would you describe Azamat as extremely  
3 religious?" "No."

4 MS. FERRONE: I was actually reading a little bit past  
5 that. I'm sorry, your Honor.

6 THE COURT: Well, "Did he ever discuss his political  
7 beliefs with you?", that is, Ms. Kumiskali. Apparently, he did  
8 not care to engage in political discussion with Ms. Kumiskali.

9 But all of that is, it seems to me, not relevant in  
10 any way, so I am sustaining that objection.

11 MS. FERRONE: Okay.

12 THE COURT: And we turn to Page 91, 31 of the  
13 transcript. I am not sure that smoking marijuana negates the  
14 intent to obstruct.

15 MS. FERRONE: Your Honor, this is something that I  
16 would argue is relevant subject to connection. And I am happy  
17 to provide an *ex parte* offer of proof, but I think if I said  
18 anything more I would be jeopardizing my client's --

19 THE COURT: Maybe. But if what you are saying -- even  
20 I picked this one up -- if what you are saying is an argument  
21 may be made that their concerns were over marijuana trafficking  
22 or distribution or use with the backpack and that information,  
23 I understand that. But that they smoke a lot of dope --

24 MS. FERRONE: Your Honor, I would ask that you reserve  
25 ruling. I don't know how you can really do that, but if I can

1 just make an *ex parte* -- it's really relevant subject to  
2 connection. It is. There is something that is going to come  
3 out in our case in chief that this completely corroborates.

4 THE COURT: Well, I think I probably should take an  
5 offer of proof on that, because I want the transcript to come  
6 in in total, I do not want it to be bits and pieces. So, maybe  
7 an *ex parte* submission that just consists of a brief offer of  
8 proof, so I understand more particularly than I think I did  
9 what is going on.

10 That, I assume, deals with all of the objections on  
11 Pages 92 -- well, on Page 31. These are all marijuana  
12 objections.

13 MS. FERRONE: Yes.

14 THE COURT: I am not ruling on that until I look at  
15 that to see whether or not it is properly to be introduced.

16 MR. CAPIN: And, your Honor, simply because we may not  
17 have an opportunity to be heard after the *ex parte* -- after the  
18 offer of proof, I think the Court has drawn, based on just what  
19 we gather the defense may be, the right line, which is that, if  
20 somehow the conduct, the obstructive conduct was more about  
21 marijuana than about the bombing, then that sounds like a  
22 legitimate defense. On the other hand, to lard on just all of  
23 this other stuff about the fact that they all, it seems like,  
24 were smoking marijuana, if you look at the entire transcript,  
25 you will see it's at the center of their social life. It seems

1       like it's not probative of anything.

2               THE COURT: I do not know. That Ms. Kumiskali is  
3       sufficiently familiar with their activities to know that they  
4       engage in what -- well, maybe it was not illegal activity at  
5       that point, was it? I am trying to remember the timing. I  
6       guess --

7               MR. CAPIN: It probably was not illegal.

8               THE COURT: Right.

9               MR. CAPIN: But this question would be, I mean, if  
10      there was a suggestion that their social life was about  
11      drinking to excess, to sort of besmirch --

12              THE COURT: Well, I think I am sensitive to the  
13      Government's concern --

14              MR. CAPIN: Thank you.

15              THE COURT: -- and if I think it has some weight, I  
16      may just say, well, this will not be introduced during the  
17      Government's case. My hope was to do it in the Government's  
18      case, but to the degree that the defendant wants to hold back  
19      on something, then maybe I will do it that way to understand it  
20      more fully. But, in any event, I want to understand it, so you  
21      will submit something *ex parte* on that.

22              I turn to 94, Page 32.

23              "To the best of your knowledge, during that time frame  
24      Dias knew nothing about it, am I right?"

25              The "To the best of your knowledge" suggests lack of

1 knowledge, rather than anything else. I am going to exclude  
2 it.

3 There was once an Assistant United States Attorney,  
4 who frequently, when confronted with a principle of law, would  
5 respond by saying, "I know of no law to the contrary," which  
6 was a commentary on his knowledge of the law, not the state of  
7 the law, and that, I think, applies equally here.

8 So, I am going to exclude Lines 21 to 25.

9 On Page 35, Lines 23 and 24 of Page 99, I guess, I do  
10 not know the Government's position. Is this "Silver Blaze,"  
11 the dog that did not bark?

12 MR. CAPIN: If the objection is limited to Lines 23  
13 and 24, then I, frankly, do not understand the objection.

14 THE COURT: Nor do I.

15 MR. CAPIN: She testified --

16 THE COURT: But you say he was present for -- I should  
17 not say, "Nor do I." I do. She says she doesn't know whether  
18 the phone call occurred. I do not know what the Government  
19 wants to keep it in for.

20 MR. CAPIN: I think the point is a fair one, your  
21 Honor.

22 THE COURT: So, we will take that out.

23 Then we get to Page 36. I am not sure I understand  
24 this objection. She is there and appears to be making  
25 percipient observations about texting.

1           What is the objection to this from the defense? Here  
2           the foundation and knowledge seems clear from the testimony.

3           MS. FERRONE: I think a lack of foundation is just the  
4           question itself. "Then there came a time"? I mean, it does  
5           not really -- it is such an unclear question that it's not  
6           certain what she's answering to.

7           THE COURT: Well, no, I think it is fairly clear.  
8           There were phone calls, and it was only her and Dias who were  
9           present, and that carries over into the text-messaging. I am  
10          not sure it is inculpatory in any direct way of Mr. Tazhayakov.

11          MS. FERRONE: If I could just add quickly, there is no  
12          foundation that that's, "Well, he showed you his phone who he  
13          was texting." I mean, how does she know who he was texting?  
14          How does she know that he texted Jahar? The questions weren't  
15          asked, "Did he have a discussion with you about who he sent a  
16          text to? Did he show you his phone?" So, that's the lack of  
17          foundation.

18          THE COURT: Yes, there could be more, but it is enough  
19          here to show that she was a percipient witness in this fashion.  
20          So, I am overruling that objection.

21          Then we turn to -- I mean, what is the Government's  
22          objection here, just that they should not sneak in diminished  
23          capacity through marijuana use on the balcony? It provides  
24          color to Mr. Kadyrbayev's ruminative state at the time, that  
25          "He goes out on the balcony, putting marijuana inside the pipe



1 at that time also, and so he was loading a bowl, a pipe,  
2 loading the pipe."

3 It is quite dramatic. I am not sure it is  
4 objectionable. So, what is the objection? He also took his  
5 shoes off when he loaded the pipe.

6 MR. CAPIN: I don't see any slipper reference, there  
7 isn't a collie in the image, but it is a relevancy objection,  
8 your Honor. I am not sure what fact --

9 THE COURT: I do not know. She is able to observe  
10 this. This tells us that she is a percipient witness with a  
11 flare for drawing the scene, or the questioner is.

12 But, in any event, I do not see that it should be  
13 excluded, so I am not going to, unless there is something more.

14 MR. CAPIN: No, your Honor. Although, I don't know if  
15 we are limiting ourselves to the passage on 119. I think the  
16 Page on 120 is even less relevant.

17 THE COURT: That she smoked the pipe can go to her  
18 ability to perceive, and it seems to me, while a little  
19 strained, I am not going to take it out, and, of course, she  
20 made the observation that Azamat did not smoke the pipe.

21 MR. CAPIN: Which is not relevant to any fact.

22 THE COURT: Well, it is relevant to his knowledge and  
23 ability to perceive the events at the time, and it goes to, for  
24 instance, statements that he might have made.

25 MR. CAPIN: Fair enough, your Honor. Thank you.

1 THE COURT: He was not a dope-smoker during this time  
2 period.

3 So, I am overruling that objection on 120 as well.

4 Then we turn to the "showing about 3 to 4 inches."  
5 This is on Page 45. I guess this is an editing thing. I do  
6 not know. The video is going to be shown to the jury, right?

7 MS. SIEGMANN: Yes.

8 MR. CAPIN: Yes.

9 THE COURT: Apart from deposition technique,  
10 Mr. Wooldridge, is there any reason why this needs to be  
11 memorialized in the --

12 MR. WOOLDRIDGE: No, your Honor. We were just  
13 discussing amongst counsel that if the video wasn't actually  
14 shown, we would need that.

15 THE COURT: Since it is going to be shown, then we  
16 will just keep that out.

17 Then we go to this, I guess, again, perplexity as to  
18 the objection. Dias tells Ms. Kumiskali that the backpack  
19 contained fireworks. That is inculpatory, isn't it? He told  
20 her; he did not show her the backpack.

21 MR. CAPIN: Understood, yes.

22 THE COURT: So, unless there is something more, I am  
23 going to overrule that objection.

24 MR. CAPIN: Thank you, your Honor.

25 THE COURT: Then, I do not know why I should exclude

1 this. She says Azamat was not in the room when Dias said that  
2 the backpack contained fireworks. So, we did not hear it and  
3 did not have an opportunity to say, "Oh, no it did not," or, "I  
4 never saw it," or, "I had nothing to do with it." So, I am  
5 going to overrule that objection, too.

6 Then on Page 124, I do not know why I should keep that  
7 out.

8 MR. CAPIN: Well, it's certainly less relevant than  
9 any other portion of the passage.

10 THE COURT: But it indicates a concern about the  
11 inculpatory nature, generally, of the backpack being there.  
12 She is mad because her boyfriend is talking about this backpack  
13 in this way that is likely to get them in trouble, at least  
14 those two and, perhaps, as we now see, two others. So, I do  
15 not know why her response to that should be excluded over the  
16 Government's objection.

17 MR. CAPIN: The relevancy is the only point --

18 THE COURT: I can see why the defendant might be  
19 wanting to use it, to show distance between Mr. Tazhayakov and  
20 Mr. Kadyrbayev in terms of knowledge and involvement and that  
21 sort of thing. So, I am overruling that objection.

22 This next set of objections is a little bit more  
23 meaty. We are on Page 47. We are dealing with 127 through  
24 130, or this portion of 130.

25 Certainly, Lines 8 through 10 should be out. She did

1 not have a conversation with Azamat about that, and so the  
2 question was never ratified. It is irrelevant. There is no  
3 evidence of this. So, 8 and 10 go out. Then I go on to 14,  
4 and now we are talking about Dias, and it is asking her about  
5 the implications of the backpack. That seems to me to come in.

6 Then we turn to a question that is asked of her, that  
7 is on Line 2 of 128, that she rephrases, but it elicited an  
8 answer that is responsive to the larger issue. I am going to  
9 let that come in. And she ratifies that when she told Dias  
10 about it he had not thought about it, and the answer to that  
11 is, "Yes." Now, whether believable or not is another matter,  
12 but, in any event, that is the back and forth.

13 MR. CAPIN: And I guess the one issue we have is with  
14 that last exchange, which purports to be an exculpatory  
15 statement by Kadyrbayev to --

16 THE COURT: I think it is best characterized as a  
17 mitigation of the exculpatory character of the exchange. So,  
18 if it is against interest, but not too much, I do not think  
19 that that takes it out of 803(b)(4).

20 MR. CAPIN: 804(b)(3).

21 THE COURT: Dyslexia attacks again. But, in any  
22 event, it does not take it out of it. Maybe somebody could  
23 argue he was too dumb to know what it meant and he needed his  
24 girlfriend to tell him. But what it does show is that there  
25 was a discussion in which this defendant was on point, had been

1 directed to the dangers of this, and he nevertheless talked  
2 thereafter to the agents during the course of the conspiracy.  
3 So, I am not going to exclude that.

4 Then, I am not sure what the objection is here by the  
5 Government, "here" meaning on Page 131 through 132. It is not  
6 really hearsay. She told him to get rid of the backpack. That  
7 is a verbal act.

8 MR. CAPIN: Fair enough, your Honor. We withdraw  
9 that.

10 THE COURT: Then we go to the next, which is what  
11 happened after she told him to do that, and he left the  
12 bedroom. I see a real problem here as Lines 4 through 8, which  
13 is, again, she did not hear that. It is argumentative. I am  
14 going to exclude it. So, that is Lines 4 through 8 on Page  
15 133.

16 Then we come to Page 58 of the transcript and Page 139  
17 of the full transcript. I do not know why this is not --

18 MS. FERRONE: Your Honor, we withdraw that.

19 THE COURT: All right. Fine.

20 MR. CAPIN: I'm sorry. Just so we are following  
21 along --

22 THE COURT: We are on Page 50 of the redacted  
23 transcript.

24 MR. CAPIN: I thought so, your Honor. Thank you, your  
25 Honor.

1 THE COURT: And it is Page 139 through 140.

2 Then we go to Page 51 of the redacted transcript. I  
3 think that is the remainder of that objection, so it stays in.

4 Then we go to Page 52, and we have got this "no more  
5 backpack" discussion, which I have dealt with already, so I am  
6 overruling that objection.

7 And the question is did he tell her what he did with  
8 the backpack. Now, I would permit or be prepared to exclude  
9 from Page 143 Lines 12 through 14, which is simply that a  
10 conversation did not take place. That just seems to me to  
11 be --

12 MS. FERRONE: Page 142, your Honor? I think you may  
13 have misspoke and said "143."

14 THE COURT: Oh, I am sorry. 142, Lines 12 through 14  
15 can be taken out.

16 MS. FERRONE: Thank you. 12 through what? I'm sorry.

17 THE COURT: Lines 12 through 14.

18 MS. FERRONE: Thank you, your Honor.

19 (Pause)

20 THE COURT: I think I am going to let this in, that  
21 is, 143.

22 MR. CAPIN: 143 is out, your Honor?

23 THE COURT: No, it is in.

24 MR. CAPIN: For the same reason the Court excluded on  
25 Page 142, 12 through 14, shouldn't, at a minimum, 143, Lines 6

1 and 7 be out?

2 THE COURT: No, because here I think it is important  
3 that she is asked specifically if she asked him if anybody went  
4 with him, to set up the degree of the communication. It is  
5 tight enough that it seems to me to be permitted here, so I am  
6 going to let it stay in. So, I am overruling that.

7 Then, the rest of this stuff, it seems to me, is not  
8 really relevant. I should not say "the rest of this stuff." I  
9 am on Page 56. But whether they were in handcuffs, or, more  
10 accurately, whether she was in handcuffs or not in handcuffs  
11 seems to me to be immaterial for this defendant, unless there  
12 is something else here I am missing. But not hearing that I  
13 am, I am going to exclude it.

14 Back to Page 153. That is focused on her, and that is  
15 not relevant here, so I am going to exclude that.

16 MS. FERRONE: Your Honor, just respectfully --

17 THE COURT: Sure.

18 MS. FERRONE: -- the reason why we think this is  
19 relevant is for a couple of reasons. My client, Ms. Kumiskali  
20 and Mr. Kadyrbayev were all arrested at the same exact time,  
21 they were ordered out of the house at the same exact time, they  
22 were ordered out by the same agents, they were taken to the  
23 same place, they were interviewed at the same time, the agents  
24 were going in and out of the same rooms talking to each other.  
25 We have seen video. So, just to the extent that her

1 questioning is relative to the treatment of my client, I do  
2 think it has some relevance. Thank you.

3 THE COURT: I will think about letting it come back in  
4 at a later point, if it does become relevant, but I do not  
5 think that the way in which another potential subject of the  
6 investigation was treated is sufficiently related to the issues  
7 that are going to be before the jury here.

8 So, I am going to exclude it, subject, obviously, to  
9 revisiting if it becomes somehow relevant or somehow disputed  
10 that the defendant, this defendant, Mr. Tazhayakov, was treated  
11 in the way that he was treated, and that the time that was  
12 involved was the time that was involved. I do not think it is  
13 in dispute about how much time was taken, within ranges, that  
14 he was without a shirt, and that I think, if I remember  
15 correctly, he only had a glass of water. So, it does not prove  
16 anything here.

17 That the agents had phones and they could have used  
18 them is certainly interesting but I think not relevant, so I am  
19 keeping all of that out. That is 155, 156, 157. 156 and 157,  
20 again, deals with the experience of Ms. Kumiskali, not the  
21 defendant himself.

22 MS. FERRONE: Your Honor, I apologize for  
23 interrupting.

24 THE COURT: Sure.

25 MS. FERRONE: Page 157 doesn't really deal with the



1 phones. It sort of just kind of connects to my earlier  
2 argument about that perhaps you could revisit it if it becomes  
3 relevant about the treatment and statements that were made and  
4 not made.

5 THE COURT: It is not just treatment. Sure, I will  
6 think about it, although right now perhaps it is a limit of  
7 imagination, but I cannot imagine how it would be relevant at  
8 any point.

9 As to the phones, that is relevant only if they asked  
10 if they could use the phone, or asked if they could call a  
11 lawyer, which, apparently, the state of the evidence as I now  
12 know it, they did not.

13 MS. FERRONE: Okay. Thank you, your Honor. Just 157  
14 was the one part.

15 THE COURT: So, that takes us all the way through, I  
16 think, to 174, but, in any event, through -- well, up to Page  
17 175.

18 MR. CAPIN: And, your Honor, if I may, and this may  
19 just be a preview of a motion we are going to be filing, but I  
20 think that some of the context ended up on the cutting room  
21 floor, but the phones in the deposition, if memory serves, the  
22 significance of the phones wasn't to make a phone call, but the  
23 suggestion was that the interview could have been recorded, and  
24 we will be moving *in limine* on whether Government witnesses can  
25 be confronted with the recent change, prospective change in FBI

1 policy as regards to recording interviews.

2 THE COURT: All of this, irrespective of what I say,  
3 the policy was not -- how I deal with it -- the policy was not  
4 then applicable. I will, of course, permit the defendants to  
5 inquire whether or not they recorded it at that time and the  
6 reasons for not doing so. But I think it is a subsequent  
7 remedial action, frankly, to change the policy, at least in a  
8 discretionary way. But I will look at this when it pops up.

9 MR. CAPIN: Fair enough. So, we will address it then.

10 THE COURT: Right, it has got to be raised. If you  
11 want to keep out the new policy, you have got to raise it, and  
12 I will rule on it when I have seen it in full context.

13 MR. CAPIN: Understood.

14 THE COURT: They will get to ask, "Did you do it?"  
15 "You could have done it?" "You didn't do it?"

16 MR. MYERS: Just so we are all on the same page and we  
17 are all thinking on that note, even after their motion *in*  
18 *limine*, you would then prevent the officers from giving their  
19 reasons why they didn't, "well, according to our policy 1051 we  
20 don't have to do this or that," because that would open the  
21 door to me saying, Okay --

22 THE COURT: It would not open the door, no. I am  
23 going to deal with it in the motion *in limine*. If the motion  
24 *in limine* -- if you can properly introduce this what I have  
25 referred to by way of attenuated analogy as a subsequent

1 remedial measure, which is generally not admissible in a civil  
2 case, it means that they can have testimony, you can have  
3 testimony about what the circumstances were then, but not what  
4 the change was, and you can inquire, "Did you have a cell  
5 phone?" "You could have made a recording of this?" It does  
6 not take rocket science to do that. You will be permitted to  
7 do that, but not to say, "And then the Bureau changed their  
8 view about this?" That I have to see in context.

9 Does that clarify it sufficiently for you?

10 MR. MYERS: The sidewalk cannot be brought up as being  
11 fixed?

12 THE COURT: Right. That is exactly right.

13 MR. CAPIN: Well, except, since we have the Court's  
14 attention, the sidewalk in this case is a different sidewalk,  
15 because even under the new policy, at least our view is that  
16 this would not be a presumptive situation.

17 THE COURT: Look it; the Bureau has gotten itself into  
18 this position by its refusal for a long, long time to record  
19 when they could have and when other progressive  
20 state-of-the-art law enforcement agencies were doing that.  
21 They are stuck with that, and I will permit inquiry. Whether I  
22 will permit inquiry to say that they had an agonizing  
23 reappraisal and provided for some highly discretionary means of  
24 changing that policy, I think I will not, but I will not make a  
25 determination about that until I see your motion *in limine*.

1 MR. CAPIN: Thank you.

2 THE COURT: But this is fair game. They are, after  
3 all, in a facility that does it all the time.

4 I see the Government's objection to 175, but, again, I  
5 am overruling it. I am not sure why it is meaningful or why  
6 the Government is making it, except to distinguish or not to  
7 permit the distinction that is being made or will be made  
8 between Mr. Kadyrbayev and Mr. Tazhayakov, but I overrule that  
9 objection.

10 Turning to Page 62, I guess she can speak for herself  
11 on that, but if she is speaking just for herself about this  
12 being the first time, then it is irrelevant. The question is  
13 whether or not it was all of them, everyone present.

14 MS. FERRONE: Well, your Honor, if I may, 8 through 12  
15 establishes that they were all together when they first turned  
16 on the news.

17 THE COURT: Yes, but if somebody is watching the news  
18 before, if they are watching the Internet through the night,  
19 then I have reason to believe that this was no big surprise to  
20 Mr. Tazhayakov.

21 MS. FERRONE: Except for the fact that the question is  
22 very specific about 6:00 a.m., and that's when the parties  
23 stipulated that Jahar was publicly identified by name.

24 THE COURT: Right, but that is not in dispute.

25 MS. FERRONE: Okay.

1           THE COURT: 8 through 12 is not in dispute, as I  
2 understand it. 13 through 23 is, and that, it seems to me, is  
3 not something that she can testify to, that is shock, except as  
4 to her own shock, and her own shock is irrelevant. So, I am  
5 going to sustain that objection.

6           Then we are over on Page 64. This is the  
7 circumstances of Ms. Kumiskali's interrogation. I think it is  
8 irrelevant, because it is not tied directly to her observation  
9 of the examination of Mr. Tazhayakov. So, that, it seems to  
10 me, is out.

11           That the agent was pushy with her is kind of  
12 interesting but not so interesting as to be relevant for the  
13 jury.

14           So, I think that takes it through -- that is 66,  
15 Page 66.

16           Then we come to -- I am going to sustain the objection  
17 on Page 68.

18           MS. FERRONE: Your Honor, sorry. I know they have a  
19 hearsay objection, but this is not being offered for the truth.  
20 This is classic non-hearsay.

21           THE COURT: But of course it is being offered for the  
22 truth.

23           MS. FERRONE: No. It's really being offered to show  
24 the effect on the listener, not that Dias actually --

25           THE COURT: What listener?

1 MS. FERRONE: Well, it's a discussion between Bayan  
2 and Dias.

3 THE COURT: Right, and Dias says, "Oh, my God, I never  
4 thought of it that way."

5 MS. FERRONE: And she says, "Correct."

6 THE COURT: That is not inculpatory, so I do not see  
7 this getting in. I guess it is Mr. Stahl's punt on this one,  
8 but I do not see it getting in.

9 MS. FERRONE: Just so I fully understand -- I  
10 apologize, your Honor, and I'll be really quick -- but it's an  
11 affirmative. It's not the dog not barking. It says, "Dias  
12 says something to the effect, like, 'Oh, my God, I never  
13 thought of it that way.'"

14 THE COURT: Is that inculpatory?

15 MS. FERRONE: I think that it is, your Honor. He is  
16 saying --

17 THE COURT: It is inculpatory? Well, I do not think  
18 so. So, that is wrong.

19 Now we get to the question of effect on the listener.

20 MS. FERRONE: I'm sorry to interrupt, your Honor, but  
21 it goes to intent. Of course it's inculpatory, right? It goes  
22 to what he was thinking at the time he took it.

23 THE COURT: That is not inculpatory. He had no  
24 intent. "I never thought of it that way. Who knew? That  
25 would be wrong, that's for sure." Those are all answers that

1 are not quite inculpatory.

2 MS. FERRONE: Not the, "Oh, my God"? That doesn't  
3 enhance it?

4 THE COURT: No. The deity is not particularly helpful  
5 on this point.

6 MS. FERRONE: Okay. Thank you for letting me speak,  
7 your Honor.

8 THE COURT: So, I am excluding that.

9 Then we come to -- I guess, threading through this,  
10 this is an admission on the part of -- I am now talking about  
11 Page 70 -- on the part of Mr. Tazhayakov, because ultimately he  
12 says he is sorry, indicating that he had misled Agent Walker.

13 MS. FERRONE: The issue is that the Government doesn't  
14 overcome the double hearsay. Bayan is not a party to this  
15 conversation, so she is not --

16 THE COURT: I thought she was.

17 MS. FERRONE: No, she absolutely was not.

18 THE COURT: I thought she observed this. She says  
19 when he came in, that is, Agent Walker came in, "and I was just  
20 sitting next to Aza when we were all sitting, and I just like  
21 he said like to Aza like, hey, like why didn't you tell me  
22 earlier that a dumpster car came to pick up, or why did I have  
23 to like go and like check out the whole trash before like if  
24 you didn't tell me that you already saw how the dumpster took,  
25 like, trash from the dumpster -- the trash car, that's what."

1           Now, this is a little bit like waiting for McDough  
2     (ph) in terms of staging, but when we get to the end, she is  
3     asked, "Did Azamat respond?" And she says, "Yeah. He was,  
4     like, 'Oh, I'm sorry,' because he was. I, like -- that's why,  
5     like, John Walker, like -- that's why my car smell like trash."

6           That seems to me to be, once you thread your way  
7     through it --

8           MS. FERRONE: So, assuming it's single hearsay, I  
9     don't see how this is an admission. To me it's, you know,  
10    someone asking about why they didn't allow someone to let their  
11    car smell like trash, isn't something that somebody would  
12    respond to --

13          THE COURT: No. The question was, "Why didn't you  
14    tell me you took it to the dumpster, took the backpack to the  
15    dumpster?"

16          MS. FERRONE: And she says, "Yeah. He was, like, 'Oh,  
17    I'm sorry.'" So, she's not even sure what he said.

18          THE COURT: No. He says he is sorry that he wasn't  
19    more candid, or at least that is an argument that can be made.  
20    That is a reading that can be made, I think, of his encounter  
21    with Agent Walker.

22          So, I am going to permit that to come in, and,  
23    similarly, Page 305. There are two objections there.

24          When I get to 315, the jury is simply going to have to  
25    thread its way through Ms. Kumiskali's form of speaking, but I



1 think I will exclude -- no, I am not going to exclude any of  
2 this, because it ends up with him, that is, Ms. Kumiskali  
3 affirming that Azamat did say something about the backpack in  
4 the dumpster that day.

5 MS. FERRONE: Your Honor, on Page 71, Page 305 Lines 7  
6 to 10 or even later, I don't see how that is an admission or  
7 adoptive admission. Agent Walker is just asking why Azamat  
8 didn't say that the dumpster had been emptied.

9 THE COURT: This is providing context for this  
10 encounter, which is somewhat oblique, as described, but once  
11 you sort through it, it is Mr. Tazhayakov saying something  
12 about the dumpster in response to Agent Walker's expression of  
13 disappointment with his lack of candor earlier. I agree that  
14 it is not easily deconstructed as a literary piece, but the  
15 thrust of it I think is there.

16 So, I am overruling those objections.

17 So, I think I have dealt with all the objections with  
18 respect to Ms. Kumiskali's video.

19 MR. WOOLDRIDGE: I would just say one thing, your  
20 Honor.

21 THE COURT: Sure.

22 MR. WOOLDRIDGE: At least on Page 316, Line 8, and  
23 this is kind of a similar issue we raised earlier about  
24 Kumiskali answering, "I don't know," and that's essentially her  
25 answer to the question posed on Line 8.

1           THE COURT: No, it is not. It is, "I think he did."  
2       Someone was trying to put words in her mouth that Azamat never  
3       said anything about the backpack in the dumpster that day,  
4       question. Answer, first part of it, first sentence: "I think  
5       he did."

6           MR. WOOLDRIDGE: But then it's, "I don't remember."

7           THE COURT: "Like I just said it, like, no one asked  
8       me. I don't know even why I set it out, but, yes, that's when  
9       I -- the first time I found out about the backpack was actually  
10      in the garbage, because of the encounter between Agent Walker  
11      and Mr. Tazhayakov at the couch."

12          So, it will present a challenge for those who are not  
13      familiar with this way of answering questions, but I can see it  
14      as sufficient to permit it to be presented to the jury. You  
15      will argue to the jury, or may argue to the jury, "Who knows  
16      what she was saying and what she thought?" But that is what  
17      trials are about.

18          So, now, to the question of the questionnaires,  
19      because I think you are going to be busy this evening, do you  
20      want me to go down the list of -- you are going to have to take  
21      it down here.

22          MR. CAPIN: Yes, thank you.

23          THE COURT: But I will go through the list of ones  
24      that the Jury Clerks kind of looked at and said might be  
25      problematic. This is not a finding, it is nothing like that,

1 but it may cause you to look more carefully at these, at least  
2 for purposes of evaluation and analysis.

3 Juror No. 2, Juror No. 3, Juror No. 5, Juror No. 6,  
4 Juror No. 15, Juror No. 19, Juror No. 21, Juror No. 23,  
5 Juror No. 26.

6 And I want to emphasize that the focus on these has  
7 really been Questions 15 and 44 and 46, but there may be other  
8 problems in there. I found other problems when I was looking  
9 through them very quickly.

10 I said No. 26. The next one is 27, the next one is  
11 30, the next one is 31.

12 And I will just say with respect to 31, the Jury  
13 Clerks, without asking any question of this one, perceived a  
14 language problem, because you will find, I think, on this one  
15 that the juror simply answered her name and age and address and  
16 answered no other questions and left the room with that, which  
17 suggests to me that perhaps this is not someone you will want  
18 to have on the jury.

19 No. 32, No. 36, No. 38, No. 41, No. 45, No. 52,  
20 No. 55, No. 58, No. 62, No. 65, No. 67, No. 69, No. 70, No. 72,  
21 No. 73, No. 75, No. 76, No. 78, No. 80, No. 83, No. 85, No. 86,  
22 No. 89, No. 98, No. 99, No. 100, No. 102, No. 103, No. 104,  
23 No. 109, No. 110, No. 111, No. 112, No. 114, No. 117, No. 118,  
24 No. 119, No. 120, No. 121, No. 123, No. 125, No. 126, No. 127,  
25 No. 133, No. 135, No. 139, No. 146, No. 147, No. 150, No. 151,

1 No. 153, No. 155, No. 156, No. 157, No. 158, No. 159, No. 160,  
2 No. 164, No. 165, No. 166, No. 167, No. 168, No. 172, No. 173,  
3 No. 175, No. 178, No. 179, No. 182, No. 183, No. 184, No. 186,  
4 No. 188, No. 190, No. 191, No. 195, No. 198, No. 203, No. 205,  
5 No. 209, No. 210 -- excuse me -- No. 211, No. 212.

6 MR. WOOLDRIDGE: Excuse me, your Honor. Real quick.  
7 So, 210 is a number? I wasn't sure when you said, "Excuse me."

8 THE COURT: Yes, 210 is a number.

9 Then, the next one is 211, and the one before that  
10 would have been 209.

11 MR. WOOLDRIDGE: Okay. Thank you, your Honor.

12 THE COURT: Then we are at 213, 214, 221, 224, 225,  
13 226, 227, 229, 230, 231, 233, 234, 235, 237, 240, 242, 243.

14 So, those are the ones that were kind of culled out.  
15 You may find them to be problematic yourselves, you may not.  
16 But my encouragement is to get down to a manageable number of  
17 jurors that do not present, perhaps on their face, some  
18 problems that would require overly extended voir dire to get to  
19 the bottom of it, but, rather, people who are likely to be  
20 potential jurors but we need to know a little bit more about.  
21 So, I will look to you to do that.

22 Now, I would suggest we get together at 11:00 tomorrow  
23 morning. I would hope by that time that you have got a list of  
24 your own that is shared then, and then if there are disputed  
25 ones, one side says, "Gee, we would like to have this person

1       excused for cause," and the other side says, "No," then I will  
2       look at them from that perspective on the face of these.

3               What will happen is, when we excuse them they will be  
4       told not to report on Wednesday. On Wednesday we are going to  
5       be spending the day in some form of individual voir dire with  
6       each of these people. I will ask all of them at least one  
7       question of some sort. But you will get to see them in the  
8       Court, you will get to examine their demeanor and that sort of  
9       thing. That is part of the process. It may be relatively  
10      quick for a number of them.

11             I have in mind Ms. Ferrone's concern about what did  
12      they say see, what kind of publicity have they been exposed to,  
13      and I will ask that question. But they are here, having said  
14      that whatever they saw they are able to put it behind them, but  
15      this will be kind of a safety net, at least on that, for, "Are  
16      you sure that you can put that beside you," depending on what  
17      they say about how much.

18             I am told, I have not seen it yet, that at least one  
19      juror said that as soon as she learned that -- or he; I am not  
20      sure gender -- that they were a juror, they took it upon  
21      themselves to spend an extended period of time on the Internet  
22      to prepare themselves for their jury service. I suspect that  
23      that is not somebody that either one of you is going to want to  
24      have on the jury. I think it is admirable that someone wants  
25      to do homework before the test, but it poses some problems.

1           So, you will see all of the usual stuff that you see  
2       when people talk candidly here. But I really want to get  
3       this -- I told the Jury Clerks, "Give me a broad cross-section  
4       on those questions," and they did. I am certain that there are  
5       other questions. I did, having asked the question about the  
6       inquiry about Muslim there were some responses to that that  
7       suggests that people would have predispositions there. So, you  
8       will look at those as well.

9           So, be back here at 11:00. I hope that you will have  
10      a pretty good understanding of what you are going to do.

11           MS. SIEGMANN: Are we coming back here at 8:30?

12           THE COURT: We will be doing the same thing we did  
13      downstairs today tomorrow at about 9:00. I do not think there  
14      is a reason to come up here. The Marshals can take  
15      Mr. Tazhayakov to that holding area down there, and then  
16      counsel can show up there. I think what I will do is, I will  
17      just have Mr. McAlear call Mr. Lovett, he will call you, and  
18      then you can get Mr. Tazhayakov to that location.

19           You can do it from the basement too, can't you?

20           THE MARSHAL: Yes, your Honor, no issues.

21           THE COURT: Okay.

22           MR. CAPIN: So, straight to the second floor at 11:00  
23      or here at 11:00?

24           THE COURT: No, no. At 9:00 on the second floor to  
25      hear more or less the same thing I said today.

1 MR. CAPIN: And at 11:00, your Honor, would you like  
2 the parties to give you something in writing in the nature of a  
3 joint -- a combined list of --

4 THE COURT: I would hope that you would, yes. I would  
5 hope you would, and also identify the ones that you could not  
6 be sure about, and then I will probably spend some time looking  
7 at them shrunk down to say, "I am not going to bring these  
8 people in or this person in," or at least I will tell you and  
9 you can try to argue me out of it, so there may be an  
10 additional wait.

11 MS. SIEGMANN: If the parties were to meet after the  
12 9:00, would it have to be in writing, or is it something orally  
13 that we can --

14 THE COURT: I would like it to be in writing, but I  
15 can take even modern handwriting.

16 MS. SIEGMANN: We can send an email. Would that be  
17 sufficient?

18 THE COURT: Sure. Just something I have got that you  
19 both have shared with each other and agreed upon, so we can get  
20 through at least some of them. I think that it is unlikely  
21 that I will second-guess the ones that you agree upon. I will  
22 inquire about the ones that you do not agree upon, if there are  
23 ones that you do not agree upon, and I probably will take a  
24 second look at the people that remain at the end, just to see  
25 if I view them as problematic.

1           If I do view them as problematic, we will have a  
2       discussion late in the day about that so you know what I am  
3       thinking and you can argue me out of it, if you disagree there,  
4       on reflection.

5           MR. CAPIN: Thank you.

6           THE COURT: But I am trying to think of in the past  
7       the kind of number of people that I have been able to work my  
8       way through in criminal cases in which I have done individual  
9       voir dire in this fashion, and I think I have done 60 or 70 in  
10      a day there, without stinting in any way on developing the  
11      information. It is, I recall, quite tiring for me, because I  
12      am doing all the work, and, of course, I will ask you if there  
13      are some questions that you want me to put to the jury with  
14      each of the jurors.

15          MR. CAPIN: Can you remind us -- I think you are  
16      sitting six alternates; is that correct?

17          THE COURT: I am going to try and do six alternates.  
18      I have thought about this a bit and I will see what we end up  
19      with. In theory, if we get 40 jurors or potential jurors, that  
20      is enough, because if you use all of your peremptories, both as  
21      to the jury itself and to the alternates, then that is enough  
22      to yield us 18. It could yield us more, but it is enough to  
23      give us 18, that is, if you cross or you decide that you do not  
24      want to exercise your peremptories or something like that.

25          So, if I get a yield of 40 or something like that,



1 that survive cause charge or cause challenge, then I am ready  
2 to go on peremptories, in theory. I might want a few more. I  
3 have thought about that we are going to have the holiday  
4 weekend in which people may reconsider what they said and want  
5 to bring to our attention newly discovered insights about  
6 themselves, so I might have a few more.

7 I do not generally tell people that they are the  
8 alternates. They may be able to figure it out, but I do not  
9 tell them that they are the alternates, and they will not see  
10 it, because I think the preemptory challenges will probably  
11 take place out of their presence, that we will go through all  
12 these people. I want to spend the least amount of time with  
13 them that I can and send them on their way.

14 You will have the list, here these people are. Then  
15 we will go through the preemptory challenge but without them  
16 being present in the room.

17 MR. CAPIN: And what does the number of alternates do  
18 to the number of peremptories?

19 THE COURT: With six it goes to three, three each.

20 MR. CAPIN: Thank you.

21 THE COURT: And that is what I am going to be shooting  
22 for. It is a three-week trial. Sometimes jurors are bored by  
23 trials. This will not be a boring trial for the jurors, and so  
24 I do not think when we get people we are going to be seeing  
25 people ask to leave. That is the principal concern about

1 alternates. But I do not want to have a three-week trial or  
2 two-week trial, which is what I think this is going to be, and  
3 have at the end not enough jurors to decide the case.

4 Mr. Myers?

5 MR. MYERS: Let's see. I'm just kind of figuring out  
6 the math here.

7 THE COURT: 10 for you on the main --

8 MR. MYERS: And they get 6?

9 THE COURT: And they get 6.

10 MR. MYERS: And that's 16, and we get 3 each for the  
11 alternates?

12 THE COURT: Right.

13 MR. MYERS: Adding that all up, 16, 19, that's 22.

14 THE COURT: Yes.

15 MR. MYERS: And we need 18 people.

16 THE COURT: Yes. Subtract that from 40, and you have  
17 got 18.

18 MR. MYERS: I'm just questioning the 40, as opposed  
19 to, say, 50 or 60.

20 THE COURT: 40 is the minimum model to get 18, right?  
21 22 --

22 MR. MYERS: I get the numbers, but I'm just saying if  
23 we have problems with just four jurors, by my calculation, just  
24 through something that happens, then all of a sudden we have  
25 got to pull in a whole new panel.

1           THE COURT: No. The way in which it would work is, if  
2 we had 40 that make it through cause challenge, then if you use  
3 your peremptories, all of your peremptories, we are going to  
4 end up with 18 people who are the jurors: 12 regular jurors, 6  
5 alternate jurors.

6           Lurking in the back of my mind is a concern that I  
7 might have someone who over the weekend thinks about it and  
8 decides that they now remember that they had a close friend who  
9 was badly injured in the bombing or something. Then, I would  
10 have to knock them off. But with 6 alternates, I do not see  
11 that I have got that much of a problem with it. But I will be  
12 a little bit loose on that. I will not go "Bingo" as soon as I  
13 hit 40, I do not think.

14           I want to be sure that the perplexity has not spread.

15           MR. MYERS: I understand one hundred percent. I just  
16 always have a perplexed look on my face.

17                                 (Laughter)

18           THE COURT: Then, that is how I will respond to the  
19 look, which is, I will wait until you stand up and say, "No, we  
20 cannot do that." But I think it works here.

21           All right. So, I will see you tomorrow morning when I  
22 enter the Jury Room. Then we will go through the same drill.

23           MR. CAPIN: Thank you, your Honor.

24           MS. FERRONE: Thank you, your Honor.

25           MR. MYERS: Thank you, your Honor.

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THE CLERK: All rise.

(The Honorable Court exited the courtroom at 5:22 p.m.)

(WHEREUPON, the proceedings adjourned at 5:22 p.m.)

C E R T I F I C A T E

I, Brenda K. Hancock, RMR, CRR and Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of *United States v. Tazhayakov*, No. 1:13-cr-10238-DPW-2.

Date: August 25, 2014

s/ Brenda K. Hancock  
Brenda K. Hancock, RMR, CRR  
Official Court Reporter